

10-23-1980

Volume 11 (Part 3)

District Court of the United States for the Northern District of Ohio, Eastern Division

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1 what they are saying at all. The thrust of the
2 defendant's argument is that the City has
3 contended that the proximate cause of Muny
4 Light's demise is the predatory tactics, and
5 the competitive tactics of CEI. The defendant
6 contends further that in the case of the Sewer
7 Department and the Water Department, where they
8 are not involved, ergo, absent the predatory
9 claimed proximate cause, those two divisions are
10 in the same plight as Muny.

11 At this juncture I take it the question of
12 mismanagement, or whatever, is not even presented.
13 I mean that issue could be considered without the
14 element of mismanagement. I'm sure that the
15 element of mismanagement will come into it.

16 MR. LANSDALE: Yes. If we fail in
17 our proof with respect to these things, then we
18 fail.

19 THE COURT: That's right. But, as
20 I say, if it develops a voir dire examination is
21 going to be required on any aspect of it as the
22 evidence evolves, I will be happy to accommodate
23 the parties, as I have said.

24 MR. NORRIS: Well, I thought that --
25 Maybe I misunderstood the order but I thought that

1 question of the danger of undue prejudice to the
2 plaintiff, that if there is mismanagement
3 demonstrated in Water or Sewer that the jury
4 might then assume that Muny Light must have
5 had the same kind of mismanagement, there
6 certainly is that danger, and the plaintiff
7 believes there is that possible inference that
8 might be drawn, and before the jury would be
9 permitted to hear that kind of evidence there
10 are so many differences between Water and Sewer
11 on the one hand and Muny on the other --

12 THE COURT: Well, what are the
13 differences?

14 MR. LANSDALE: We contend --

15 MR. NORRIS: Pardon me?

16 THE COURT: What are the differences?

17 MR. NORRIS: Well, in the case of
18 the Sewer Department it's a much smaller operation.

19 THE COURT: That's not a
20 difference. It's just a comparative situation.

21 MR. NORRIS: Well, I am looking at
22 your language, your Honor, the financial plight.
23 If you look at the balance sheets, I question
24 whether there is a financial plight.

25 THE COURT: Well, I don't know.

1 As I say, I don't know. This is what we have to
2 make a determination on -- this is what the jury
3 is going to have to make a determination on.

4 At this juncture the only thing the Court
5 is concerned with is there doesn't have to be
6 identical similarity but is the similarity
7 between the table of organization, delegation
8 of responsibility and authority, these physical
9 aspects, of such a similar nature as to warrant
10 the admissibility of the evidence concerning
11 the operation of these two departments? If
12 that exists, then the question of whether or
13 not there is a condition in either of these
14 departments similar to the claimed condition
15 of MELP is a question of fact for the jury.

16 MR. NORRIS: Well, of course,
17 another significant difference is the lack of
18 competition. You don't have a competitive
19 situation in either Water or Sewer.

20 THE COURT: That is precisely
21 what they are saying.

22 MR. LANSDALE: Exactly.

23 THE COURT: You hit it right on
24 the head.

25 MR. LANSDALE: Exactly.

1 THE COURT: They are saying,
2 absent that competitive situation, namely, where
3 defendant is asserting these predatory tactics,
4 and if the situation confronting the other two
5 departments is similar to the situation
6 concerning Muny Light, then "You can't blame us,
7 fellows," is what the defendant is saying,
8 "because we ain't even there." Excuse the
9 "ain't."

10 But that, in sum and substance, as I
11 understand it, is the thrust.

12 MR. LANSDALE: That's exactly it.

13 THE COURT: And what I have
14 gathered from the briefs, in regard to the
15 opinion that is precisely it.

16 MR. LANSDALE: That's exactly it.

17 MR. NORRIS: In terms of the
18 proximate causation the City doesn't have to
19 prove that the antitrust violations were the
20 only cause of their injury.

21 THE COURT: In what? As far
22 as Muny Light is concerned?

23 MR. NORRIS: That's right.

24 THE COURT: Well, if you don't
25 think you have to prove that, you've got a

1 different understanding of the law than I have.

2 MR. NORRIS: Just so long as it is
3 a substantial factor in causing the injury. Just
4 because there could be an element of mismanagement
5 in Munny Light, that doesn't put us out of court.

6 THE COURT: You are talking about
7 a question of fact to be decided by the jury
8 and your second sentence or statement is somewhat
9 different than your first statement. The first
10 statement says that the City doesn't in fact
11 have to prove proximate cause. If you don't
12 think you've got to prove proximate cause, you
13 better go back and read the law on proximate
14 cause, and I will be happy to show you my charge
15 on proximate cause on any tort case.

16 MR. NORRIS: I am saying it doesn't
17 have to be the only cause.

18 THE COURT: What?

19 MR. NORRIS: There can be other
20 factors in addition to the antitrust violation
21 that result in a loss situation for a plaintiff,
22 but certainly the law is not that the antitrust
23 violation must be the only thing that contributes
24 to the injury. There may be other factors, too.

25 MR. LANSDALE: What he is saying is

1 if a man has a broken leg he is not entitled to
2 rebreak it. I don't disagree with that.

3 MR. NORRIS: We have to prove
4 that the damages that we have measured flow from
5 the conduct. I agree with that.

6 THE COURT: The proximate cause
7 of the antitrust, direct or proximate cause.
8 That's the language of the charge.

9 As I say, there certainly, at this juncture,
10 at least at the close of plaintiff's case, is
11 sufficient evidence to warrant requiring the
12 defendant to go ahead to all of the -- as to the
13 three issues, namely, monopolization, proximate
14 cause and damages.

15 So let's go, gentlemen.

16 THE COURT: Bring the jury in.

17 - - - - -

18 {The jury was reseated in the jury box and
19 the trial continued as follows:}

20 THE COURT: You may proceed.

21 MR. LANSDALE: We call Mr. W. Dennis
22 Berback.

23 - - - - -
24
25

1 W. D E N N I S M E R B A C K,
2 having been called as a witness on behalf of
3 the defendant, after having been duly sworn,
4 was examined and testified as follows:

5
6 DIRECT EXAMINATION OF W. DENNIS MERBACK
7

8 BY MR. LANSDALE:

9 Q State your name, and give us your address, please.

10 A W. Dennis Merback, 5636 Trowbridge Drive, Dunwoody,
11 Georgia.

12 Q What is your business or profession?

13 A I am a Director with the firm of Arthur Young
14 Company.

15 Q What is the Arthur Young Company?

16 A Arthur Young & Company is one of the large industrial
17 management consulting, accounting, auditing and tax
18 service firms.

19 Q Mr. Merback, will you give us an outline of your
20 education?

21 A I have a Bachelor's degree in engineering from the
22 University of Utah, and I graduated in 1961, and I
23 did my graduate work in business administration from
24 UCLA.

25 Q And what has been your employment history since your

Merback - direct

graduation?

A After two years in the service, I hired as an industrial engineer with the Litton Industries in California, and then I was employed as an industrial engineer by the Eldon Industries, Inc. in Hawthorne, California.

And in 1965 I was employed by the Arthur Young & Company as a management consultant.

Q And since you have been with Arthur Young & Company, have you had some area of specialization or areas in which you have had primary experience?

A Primary experience, functionally, in operations management and industrial engineering, and in terms of the types of clients served, after about five years working with commercial clients, for the last ten or more years I have been consulting almost exclusively with governmental clients.

Q Name some of the governmental clients for whom you have done work recently and outline the general nature of the work.

A In the last few years I have done a lot of work with City and State governments in terms of operational reviews and method analyses and management systems projects.

Merback - direct

Some include Seattle, Washington, Savannah, Georgia, six different projects with various agencies in the State of Florida, and I worked with the State of North Carolina, and the Virginia Division of Motor Vehicles, and currently I am heading a project for the State of Mississippi of an extensive management review of six major agencies.

Q Mr. Schmitz, would you show Mr. Merback CEI Exhibit 681.

{After an interval.}

Q CEI Exhibit 681; is that a fuller statement of your background and experience as you have outlined for us here?

A Yes. It shows some 60 projects over the last 15 years.

Q All right.

Mr. Merback, what were you asked to do to prepare yourself to testify in this case?

MR. NORRIS: May we approach the bench?

THE COURT: Yes.

- - - - -

{Bench conference ensued on the record as follows:}

Merback - direct

MR. NORRIS: We object to any testimony from Mr. Merback on the scope of the project that he has described in his report, and that is on the basis of the fact that he is not an expert in the areas that are covered in the report.

He has specialized in operations resources, which as I understand it, is time and motion -- whereas the -- where is the best placement to put this new facility, the matching of people and tools, and we do not believe, your Honor, that he is qualified to talk about the management effectiveness that is throughout his report, and we submit that before he is permitted to testify on these issues in front of the jury, that there should be a voir dire examination as to whether this man is actually appropriately qualified to deliver these opinions.

THE COURT: Well, I think that is not an unusual request.

MR. LANSDALE: Certainly. He can examine him. I have no objections.

THE COURT: All right.

Rather than making it a voir dire examination,

Merback - direct

we will permit it in the presence of the jury at this juncture, and subsequent to which the Court will make a determination if that is satisfactory.

MR. LANSDALE: You want him to go ahead right now. All right. I agree.

MR. NORRIS: All right.

THE COURT: When you are finished with your qualifying of him, maybe you will want to go into --

MR. LANSDALE: Well, I was going to rely on the written statement, but, if counsel wishes to cross-examine him on the qualifications at this point, I certainly have no objection.

THE COURT: Very well.

MR. NORRIS: If you want that in front of the jury -- do you?

THE COURT: Yes.

{End of bench conference.}

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THE COURT: Mr. Lansdale, when you have concluded your examination concerning the educational background and expertise of Mr. Merback, and then I will permit Mr. Norris to

Merback - direct

examine as to that subject.

MR. LANSDALE: He may examine now,
if your Honor please.

THE COURT: Very well.

CROSS-EXAMINATION OF W. DENNIS MERBACK

BY MR. NORRIS:

Q Mr. Merback, how would you describe the assignment that you were asked to perform in preparation for your testimony in this case today?

A We were asked to evaluate the management effectiveness and operating efficiency of a number of City operations.

Q In your qualifications that I have looked at, I see some 60 projects that you have worked on since you have been with Arthur Young, and would you agree that a large proportion of those projects dealt with time and work measurements?

A Time studies, work measurement are a part of a number of projects conducted, but those projects were not time and measurement studies as you say.

Q Now, you have a B.S. degree in industrial engineering. You graduated in 1961; is that correct?

Merback - cross

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A I have a B.S. in electrical engineering, 1961.

Q And have you done any updating -- have you taken any management courses?

A Yes, I have taken a number of courses throughout the years, probably upward of 15 to 20 through various offerings from outside organizations as well as within our own firm.

Q And would you identify -- are these correspondence courses?

A No.

Q Tell me what management courses that you have taken since adjoining the Arthur Young Company.

A That is going to take a little recollection, but they have been courses in financial planning and control and a number of courses in industrial engineering, and courses in awareness of data processing, and in organizational and management developing, and in personnel practices, and I could go on, but I would have to refresh my memory to be more specific. That is the general nature.

Q I am interested in two of those five that you identified, the management development.

Tell me, please, what institution it was that you took courses in management development?

Merback - cross

1
2 A This was through an in-house seminar program,
3 educational program, that Arthur Young has where we
4 will use either outside personnel or personnel who
5 specialize in these particular areas to instruct
6 the courses.

7 Q Over what period of time did that seminar take place?

8 A These seminars typically are eight hours a day
9 seminars that would run three to five days.

10 Q And how many of those seminars have you participated
11 in on the subject of management development?

12 A Well, I want to make sure I understand what you mean
13 by the term "management development," because that
14 has a fairly precise meaning, and that was one
15 session on that precise subject, but in a general
16 area of management, I have taken numerous courses.

17 Q Well, I wrote down these five.

18 In the general management area you said financial
19 planning, control, industrial engineering, data
20 processing, management development and personnel
21 practices.

22 And the first of those that I asked you about has
23 to do with management development, and do I understand
24 that there have been several seminars in the general
25 area of management development that you have attended?

Merback - cross

1
2 A No. I have attended one, but let me stop a moment
3 and restate some of the current education, because
4 there have been so many, and I really just forgot
5 about this one, and that is currently and the most
6 applicable, and that was a two-week seminar put on
7 by the Harvard Advance Management Program, where we
8 have partners from around the firms attend.

9 It is over two weeks, six days a week, and it
10 is taught by professors from Harvard, from the
11 Harvard Advance Management Program, and it deals
12 with really almost every aspect of business and
13 management.

14 Q And when did you attend that?

15 A During the month of August of this year.

16 Q When did you do the work on this assignment that you
17 are testifying here today?

18 A This work has been going on for a little less than
19 two years, with the summarization of this information
20 over the last several months.

21 Q So that the bulk of your work with respect to today's
22 testimony was done prior to the month of August of
23 1980?

24 A Certainly the bulk of hours were expended; however,
25 many of the conclusions and analyses were finalized

Merback - cross

during these last few months, and I am not sure -- I would have to look to see what proportion was which side of that seminar.

Q Now, your professional experience with Arthur Young, am I correct, it has been generally in the industrial engineering area, generally?

A That is my primary area of specialization; however, when you have been in the business as long as I have, we are really talking about all aspects of management.

I have responsibilities for many types of consulting projects, and I do many types, and they really address all there is of management, and go well beyond the area of specializing in industrial engineering.

Q Would you say that the 60 or so jobs that you have worked on have dealt essentially with worker productivity and goal setting for workers?

A That is a part of it, and let me elaborate, on a good number of the projects, particularly in the governmental environment, we have identified them, and you will see in my resume what we call "resource management systems."

These are fairly extensive programs that are really designed to develop a management tool, and

Merback - cross

1
2 a management tool on how to better perform management
3 processes and how to establish objectivity and develop
4 proper budgets, and how to develop the proper kinds
5 of reports for management decision making, and how to
6 measure effectiveness of management, and how to
7 measure operational efficiency, so those are systems,
8 and a part of the base that the systems are developed
9 from are the work standards.

10 Q When you were hired in the 60 or so projects that you
11 have done for Government, for Government departments
12 or corporate entity departments, and I am referring
13 to the resource management systems work that you
14 have done; am I correct that you have generally,
15 generally have been hired by the head of the department
16 of a many department corporational municipality?

17 A That is not necessarily true.

18 For instance; in several of these states,
19 including Florida and North Carolina, we were hired
20 really in the case of Florida by the Lieutenant
21 Governor, and in the case of North Carolina, by the
22 head of the Department of Administration, and in
23 Mississippi by the Commission is mostly of
24 legislators, including the Governor and Lieutenant
25 Governor, and they tended to be the top executives

Merback - cross

in the organization.

Q Now, in the county of Santa Clara, you identified on page 7, an audio visual training course for the County Court Clerk.

A That was some years ago, yes. That was part of their work.

Q And with respect to the Ramsey County work, you were task leader for development of work loads and office layouts for the newly consolidated county municipal court?

A That was a minor project, about a week.

Q And then the Imperial County, and you were project director for a Sheriff's Department space needs and facility planning study. The study included analysis of functions and adjacency requirements, projections of personnel, and space needs, and development of facility block plans and cost estimates?

A That is correct.

Q And in the Florida Department of Transportation work that you described, this was a manpower-management as opposed to management effectiveness; is that correct?

A That is not correct. That is again a project that is

Merback - cross

like a resource management system.

This happened to be a system for management, for managing the construction and engineering and inspection functions of the Florida Department of Transportation, and again, it dealt heavily with proper budgets, proper budget representation and proper allocation of resources and proper management information for decision-making.

Q How many of these six projects -- well, strike that.

I also notice that you helped a company move its factory, and to figure out the overall operation of the newspaper-mail work and work in the layout of the warehouse.

Of the 60 projects that you have identified in your credentials, how many, roughly, would you think your involvement was restricted to a unitary function such as "Where should a mail room be located?" as distinguished from responsibilities for Arthur Young dealing with qualitative analysis of management performance, measuring the effectiveness of management performance?

Can you give me some kind of a breakdown between what I have called the unitary type job and the more far-reaching policy level management effectiveness

Merback - cross

analysis?

A There would be two ways to look at that, and one is in terms of the number of projects, and the other is in terms of the duration of the consulting assistance; because many of the unitary projects that you are talking about were very short, one-shot type of operations.

In terms of numbers, again, you could divide it to the point in my career when I was a newer consultant and I was much more involved in that, as a learning process, to get experience.

During that time probably -- well, let me put some overall numbers together.

Since that time I have almost been exclusively involved in a broader range management issues.

If you took simply the number of those 60, I would guess maybe a fourth or a third would be the unitarian types of projects, because even though the may seem somewhat narrow in terms of the descriptions, in most cases you are dealing with the upper levels of management, and you are having to relate your recommendations to the rest of the operation and how it fits in. You cannot do it in a vacuum.

Merback - cross

Q When did you first -- strike that.

When was your first assignment with Arthur Young that dealt with the broader range task involving the necessity to evaluate management effectiveness and quality?

A Really, probably the very first project which was a manpower management system for the First National Bank of Minneapolis, and that was back in 1965, and on that I was simply a staff person, so I was involved in lower level areas.

The second project was, again, over a little over a year long with a printing publishing company in Chicago, and I was the entire consulting project for well over a year, and it dealt, I dealt every day with top management and top management issues, and layoffs, and management systems and procedures, so I really started fairly early.

Q When was the Chicago assignment?

A 1966-1967.

Q What was the assignment that you were asked to perform for the client?

A This was the one that is described on the second bullett of page 10, which is developing a work measurement program, but it also took the results of

Merback - cross

that and determined procedure, staffing level, and then worked with top management to determine how to affect those staffing levels, and we took that data and decided how to make the proper kind of management reports, and we got involved in a lot of aspects of that business.

Really, we were dealing with the Executive Vice President every day on that project.

Q But your assignments were restricted to the work measurement program for 400 direct or indirect employees?

A That is a very concise statement of that project.

Q How big was the organization?

A Well, it was the Rand-McNally Company, a pretty good sized organization.

Q So that the direct task that you were performing was dealing with 400 of the Rand-McNally employees, and that certainly would not be the equivalent to a task where you were asked to evaluate the management effectiveness of top management people; is that correct?

A Not directly equivalent, but certainly that is experience that is touching many areas of it.

As I indicated, this was the second project that

Merback - cross

I had with Arthur Young.

Q Please give me the next assignment that involved your getting into an area of top level management evaluation.

A All right. The next one I think of that would fit your criteria would be work probably in about 1968-69, for the Swift and Company, where they were going through a reorganization, and we were asked -- and I was directly responsible for an evaluation of the impact on Swift and Company's total corporate sales and profits, overhead associated with closing 250 of their manufacturing and sales facilities, where we had to consider interrelationships between facilities that supplied one another, or took products from one another and had to prioritize the economic impact of closing various facilities.

Q This was an economic analysis?

A It was an economic and operational analysis, and it had to do with corporate philosophy and business strategy.

Q Reading from your page 10, am I correct, and it is the ninth bullett:

"Large food processor / wholesaler -- engagement manager for a team of four consultants conducting

Merback - cross

economic analysis of costs associated with closing 250 units and the impact on corporation sales, profit, and overhead."

Now, it says "economic analysis."

Tell me how an evaluation of management effectiveness at the top level was involved in this project, and if I missed it, tell me how it was involved. It doesn't appear from what I read.

A I guess I would need a more precise definition of what you are referring to as "management effectiveness."

The idea of looking at operations and developing business strategies is helping them to come up with more effective management of their business.

Now, it was not an evaluation of their current management effectiveness, if that is the point you are driving at.

Q Yes, because unless I misunderstood you, your assignment for this case was to evaluate management effectiveness and operating efficiencies in certain parts of the government of the City of Cleveland; is that correct?

A That is correct.

Q And so that I am inquiring whether or not your work

Merback - cross

for Swift & Company in making an economic analysis of costs with respect to closing 250 of their units, how did that get into the areas where you had to make an evaluation of management effectiveness from the top of the organization dealing with the kinds of policy matters that topes of organizations typically deal with.

A. All right. I believe I understand the distinction you are making.

I guess the reason I am having trouble making that distinction is to evaluate management effectiveness you have to understand what they are doing and what the results are, and what the processes are.

Now, if you want to more narrowly define that experience, probably the next one was in about 1971, for the evaluation of the school construction program of the State of Hawaii, which was performed for the legislative auditor for the State of Hawaii, and that was an evaluation in the terms that you are using it.

Q Help me find that. What page is that on?

A Page 2, the six bullett down.

Q It says:

"Assisted in an in-depth analysis of the

Merback - cross

1 statewide school construction program, including the
2 planning, design, construction, and maintenance
3 processes, for preparation of an operational audit
4 report."

5 To whom was the report submitted?

6
7 A To the Legislative Auditor of the State of Hawaii.

8 Q And it was an operational audit function?

9 A -- of the school construction program, all the way
10 from planning through maintenance, so we were looking
11 at how the Department of Education was doing their
12 job, and how their building services were doing their
13 jobs, and looking at the relationships with
14 contractors and all aspects of it.

15 Q Only with respect, however, to the construction of
16 schools by the Department of Education; is that
17 correct?

18 A Well, I am not sure what you mean by the word
19 "only."

20 We looked how they planned, to determine
21 school needs, as the first aspect, and we looked at
22 how they designed the schools, to make sure they
23 were being cost efficient, and the needs that the
24 educators were taking into account, and we were
25 looking into construction management, and then we

Merback - cross

1 were looking at maintenance of the facilities, after
2 the facilities had been constructed, to find out if
3 that had properly been considered in the original
4 planning.

5
6 Q And were you required in that assignment to draw
7 a value judgment as to the effectiveness of the
8 performance of the individual people?

9 A Not of individual people, but certainly of the
10 operation in the departments.

11 Q And did you draw conclusions with respect to whether
12 that department was effectively managing or not
13 effectively managing?

14 A You could put those words upon it.

15 That was not the phraseology that we used.

16 We talked about the program and how it was
17 managed.

18 I guess I should answer directly, yes, there is
19 only very subtle differences in what I was thinking.

20 Q And that was 1971, did you say?

21 A Approximately 1971.

22 Q All right.

23 Now, how many other projects, Mr. Merback, have
24 you been the principal Arthur Young representative
25 on where your assignment was to evaluate management

Merback - cross

effectiveness and operating efficiency, since 1971?

A My count is 11.

Q Would you identify which ones they are?

A Page 6, the City of Seattle, and that is about the fifth bullett down.

Q Why not list them first and give me the years.

A All right.

The City of Seattle, 1975-1976.

The City of Savanna, Georgia, on that same page, and that was 1977.

I believe on the bottom of page 7, the Florida Department of Administration, Division of Retirement, 1976-1977.

The top of the next page, the rest of the Florida Department of Administration, the Expansion Program, 1977-78.

Then the Florida Department of Business Regulations, 1978, and a little of 1979, and that is the first one, the second bullett down.

Then, the fourth bullett, the Florida Department of Transportation, which is 1979-1980.

And then The North Carolina Department of Administration, 1978, I believe, and the Virginia Division -- no, strike that.

Merback - cross

The California Department of Transportation, clerical program, on the bottom of the page, page 8, and that is 1970.

And then the California Division of Highways, well, you can strike that. That was just a planning project and never was implemented.

All right. Now, the State of Mississippi on the bottom of page 9 --

THE COURT: When was that?

THE WITNESS: That is currently in process. Started July 1, and now that comes up to, I believe, 9 rather than 11.

I think I misidentified a couple in my first count. I would have to review them.

MR. NORRIS: If I could request an opportunity during the luncheon break to put a few more questions on these nine, I would appreciate it.

THE COURT: Yes, you may.

Ladies and gentlemen, it appears that we are about five minutes past the noon hour, and that means we have to go out and eat.

So, please, during the recess, adhere to the Court's admonitions, and return here at 1:30.

Merback - cross

and we will proceed at that time.

You are free to go.

{Luncheon recess was taken.}

- - - - -

1 FRIDAY, OCTOBER 24, 1980; 1:40 P.M.

2
3 {The following proceedings were had in the
4 absence of the jury:}

5 MR. NORRIS: Your Honor, we are not
6 going to interpose any further objection to
7 Mr. Merback's credentials.

8 THE COURT: Very well. You may
9 proceed with your direct examination, Mr.
0 Lansdale.

1 {The foregoing proceedings were had in the
2 absence of the jury.}

3 - - - - -

4 {The jurors resumed their places in the
5 jury box.}

6 THE COURT: You may proceed.

7 - - - - -

8
9 DIRECT EXAMINATION OF DENNIS MERBACK

0
1 BY MR. LANSDALE:

2 Q Mr. Merback, will you explain in a little bit more
3 detail than you did in answer to Mr. Norris'
4 question what you were asked to do to prepare
5 yourself for this testimony?

Merback - direct

1
2 A Yes. We were asked to investigate the management of
3 a number of enterprise operations in the City to
4 determine whether conditions of mismanagement
5 existed.

6 Q And what enterprises were you asked to testify about
7 that you investigated?

8 A Specifically the Divisions of Water and Heat and
9 the Division of Water Pollution Control.

10 Q Will you look at the exhibit which is beside you on
11 the easel, which is the City's Exhibit 26 -- forgot
12 the number.

13 Can you tell the number?

14 A 2492.

15 Q -- 2492 and tell me where those two departments are
16 in the City's organization?

17 A This represents the Department of Public Utilities
18 and the operating divisions are Division of Water
19 and Heat here, Division of Water Pollution Control
20 is here, Division of Water Pollution Control is here,
21 and the other division in here is the Division of
22 Light and Power.

23 Q Now, what period of time did you look at in making
24 your examination?

25 A Specifically the period of time between 1965 and

Merback - direct

1978.

Q Any particular reason why you picked that span of time?

A We felt that this period was sufficient to establish a pattern to give us the ability to analyze management over a long enough period of time, and also it was a period where the most data was available to analyze.

Q Now, how did you go about making your investigation?

A Basically five steps:

We first of all establish criteria against which to measure management effectiveness and operating efficiency, and then we collected a great deal of data from various published sources, the Public Administration Library of the City, and authors of various studies, and some that counsel provided, and we read and evaluated that material, and we analyzed the data, and developed it, and then summarized it, and evaluated it, and formed our conclusions.

Q I notice you have several boxes over there beside you. What are those for?

A They contain approximately 275 some documents that we collected during the study upon which this evaluation

Merback - direct

was based.

Q Now, Mr. Merback, what were the principal factors that you considered in evaluating the City's management of the two enterprises to which you referred?

A Primarily we looked at two general categories:

One was the results of their management effort, and the second was the actual management process and tasks and how they were performed.

More specifically, within the area of results, we looked at the services that had been provided and the operating condition of their facilities, and we looked at their capital improvement planning, and also the implementation, and we looked at the financial condition, and then in terms of the management process and tasks we looked at how they planned and budgeted, and we looked at their financial reports.

Those were the five primary criteria, and then there were also some other factors, continuity of management, and adherence to legal requirements, and the opinions of people who dealt with the City, and the political influences on management and the management processes.

Merback - direct

1
2 Q Now, will you tell us in general the kind of
3 documentation that you looked at -- I don't want you
4 to identify each and every one of the 275 items, but
5 what type of things did you look at?

6 A First, we looked at the documents from the Department
7 of Financial Reports, and the State Auditor reports,
8 and independent CPA reports, and we looked at
9 capital improvement plans and the bond issues, and
10 a number of reports that were prepared by various
11 consultants, and we looked at the results of the
12 Cleveland Little Hoover Commission, and a number of
13 special committees, and we looked at a number of
14 study groups, and we looked at the most recent
15 operations and Improvement Task Force report, and
16 the City charter, and the Ohio Revised Code, and
17 the applicable City ordinances, and finally we
18 used the newspapers, really, as a basis for finding
19 out where other information might be, plus we did
20 use some quotes of the newspapers.

21 Q Now, based upon this work that you did, do you have
22 an opinion as to the quality of the City's
23 management of the enterprise activities, that is to
24 say, the two that you looked at, the Water and the
25 Sewer?

Merback - direct

operated independently as of themselves.

The major problem was the organizational structure of the governmental system in Cleveland, where we have no independent Boards or Commissions, and Water and Sewer is just another City Department of the Department of Public Utilities, and this means that rates have to be determined by the Board of Control and the City Council, and like all city operations, we found it a difficult thing, we found the difficult thing was the enterprises all share the same management political structure, the same planning and budgeting and evaluation process, and the same accounting and reporting systems; the same personnel systems, the way they hire and retain people, and the same payroll, and the same purchasing system, and the same data processing services; which means problems in those areas have a direct impact upon the operation of the enterprises, though they are not directly in control of the management, and finally we found they were not officially independent despite some legal or stated requirements, which means the problems of the City really had a direct impact on these operations and their management.

Q Well, do these problems involve factors which bear

Merback - direct

directly upon the management effectiveness and the operations of these individual enterprises?

A I think so. These enterprises are trying to function within really what is an antequated system of Government here in Cleveland, a system that has a 33-member City Council in operation as a Board of Directors with two-year terms; and none of them being "at large," and therefore no one concerned with the overall city, but rather with their own particular constituency, and it was difficult to have any continuity of planning or implementation, and a highly political atmosphere.

And we also found in this atmosphere it meant that long-range planning was really not acceptable to the Mayor and Council. They wanted immediate results and highly visible results, so long-range things, things not visible to the people, were really not looked upon favorably.

We found in their whole budgeting approach that the way it was presented and the way it was developed really didn't reflect the needed services and the other requirements.

Capital budgeting really was characterized as a joke. It was really not on the basis of a plan or the

Merback - direct

City Planning Commission's report, but it was based upon an exceptional item, one by one, that were mainly approved for political purposes rather than what is the best longer term interests of the City.

There was a lack of follow-through in many, many respects. The official relationships that I mentioned where they were tied together, these had a direct impact. The financial crisis that started in the City in about 1970-71, affected all operations, and we found that again things that directly impacted these enterprises, that there is little done to correct the causes of the problem, and instead, there was a lot of financial gimmickry going on during and throughout the period of the '70's, at least rather than trying to get at the real cause of the financial problems, so I think those are things that I had to consider in looking at these enterprises. We couldn't divorce their operations from the rest of the City and the City's operations.

Q Now, Mr. Berback, I wish to direct your attention first to the Water Department.

MR. LANSDALE: Mr. Murphy, will you put CEI Exhibit 672 on the screen?

Q Directing your attention first to the department or

Merback - direct

1 the enterprise designated "Water and Heat," first,
2 does Heat have any part of that any more?

3 A Not any more. It was part of it back -- I think it
4 was sometime in the late 1960's that the City quit
5 using steam pumps for their water operation. They
6 used to sell the heat by-product, but that has long
7 since ceased to exist.

8 Q Well, directing your attention then to the Water
9 Department, will you go through the different parts
10 of their organization or their operation, so to speak,
11 and indicate what you found, please?

12 A I would like to talk about it in terms of those five
13 primary criteria that we established as our
14 evaluation criteria.

15 As you can see, we classified all of them as
16 being poor. To be specific on why we need those
17 classifications in terms of the Department of Water
18 or Division of Water and Heat, the services and
19 operating conditions, we found there were, for
20 example, insufficient water pressure, insufficient
21 capacity since 1965 and before; one of four
22 purification plants in the City is ready to collapse;
23 there were hundreds of fire hydrants that were
24 defective around the city; the high-pressure water
25

Merback - direct

system, supposedly for fire-fighting purposes, has been inoperative for a number of years.

There are thousands of water meters that need to be replaced. The City is losing about 25 percent of the water they pump out of the lake and treat. It is never getting to the customer or never getting billed. They are losing about 15 percent for leakage through the system. Another 10 percent is getting to customers and not being metered.

We also found a number of operating insufficiencies in terms of the way those services are provided by the Division of Water and Heat.

To go over to capital improvement planning and implementation, this whole process of capital improvement planning, which is supposed to run through the City Planning Commission, went on for a number of years. In the early 1970's the Planning Commission said they were going to cut back on the nature of their request, which was a five-year plan and one-year capital budget. They tried that for a few more years in the 1970's and finally abandoned the whole process in 1977, '78 because, as the Planning Commission themselves said, the whole thing is really kind of a wish book and was universally

Merback - direct

ignored by decision-makers and they just got tired of going through the exercise, I suppose.

So this meant that the Planning Commission document really wasn't terribly helpful in terms of what we analyzed.

We looked at a number of studies that had been performed of the water operation, in 1953 by Havens & Emerson, and other in 1954, a very extensive study in 1971 by an international engineering firm, Parsons, Brinkerhauf, of the water operations, another study in 1973.

It would appear that almost nothing recommended out of these studies was implemented even though in the case of the Parsons report they spent over \$300,000 in the preparation of that report.

Besides those independent consultants or engineering firms hired by the City, the United States and the Ohio Environmental Protective Agencies jointly conducted studies of the water system in 1970 and followed up again in 1974 just before the -- well, in 1974. Those studies had almost 50 recommendations which were fairly strong recommendations and almost none of those have been implemented or, to our knowledge, have been

Merback - direct

implemented at this time.

Q Will you turn to the financial situation which is the next item in your chart?

A We found the financial condition, as a natural result of that 14-year period, to be generally poor.

In almost half the years the division had a net loss, and that is without considering what they should have done. That's just considering the money they did spend and bears no relationship to what should have been spent to improve the system.

Despite the fact that they were really in fairly shaky financial condition of their own over that period, they transferred more than \$4 million to the City general fund which were monies that, as an operating independent enterprise division, should have stayed within that Division of Water but yet were diverted to the general fund.

We found one of the problems was the fact that they have had and still do have some of the lowest rates in the country which have been called inadequate by their own consultants in terms of the needs that exist.

The financial report we used showed a number of very questionable items. The way that is

Merback - direct

presented there is no explanation. We weren't really sure why some of the entries were as they were, but particularly some of the transfer of funds to the city enterprises which are supposed to be for services, such as for the Division of Water obviously has to buy power from Muny Light to run their equipment, but yet we saw some very unusual variances or variations in the amounts they transferred that really just made no logical sense. They just didn't appear to be rational. And we think there is an indication there might be some unusual accounting treatments with those numbers.

Q What do you mean by "unusual" and "don't make any sense"?

A Normally, you would expect that an operation like the Division of Water, which is fairly stable in terms of they pump generally the same amount of water every year, and yet we were seeing from year to year the difference in the monies that were transferred from the Division of Water to the Division of Light and Power varying extremely, by millions of dollars, and some of them happened to occur in years when we have found from other records Muny Light was having some real problems financially.

Merback - direct

Q Now will you pass on to the budgeting category?

A Budgeting, which should be operational, budgeting is probably one of the most important governmental management processes. It has the effect of law when the budget ordinance is passed. But we found the process was wholly inadequate. It had been criticized many times in writing since at least 1965 and we found people who says it has perpetuated and really aggravated the financial crisis of the city.

Budgeting decisions, in our opinion, appear to be quite questionable. There tends to be again a tendency to ignore the real source of the problems and just figure, "Well, somehow, we are going to get by. We don't know how but we will get by." And this was in the budget statement and the Mayor's cover letters, in fact.

In measuring how well the budget we compared the budget amounts for each line item for each enterprise through the years and compared it to the actual amount spent, and we found some significant variances.

The receipt budget of how much they estimated they would bring in in terms of revenues, there were several differences, differences that could not

Merback - direct

be explained concerning the reasonably stable nature of the water operation.

Expenditures, they underspent their budget almost every year by millions of dollars, which means that the budget that was passed and approved by Council, the Division just didn't spend that money by millions of dollars.

A peak part of that was in terms of capital outlay and net service where they underpsent during the 14-year period \$35 million, which is really underspending by 54 percent against what they had budgeted and approved.

Building maintenance was underspent by 58 percent. And they transferred to Light and Power by more than one third the amount of money they had planned to transfer. In other words, they said we expect to have to pay Light and Power \$1 million. They would end up paying them \$1.3 million on the average through the 14-year period. In fact, in 1971 they overtransferred by 148 percent.

Q Mr. Merback, I noticed that on "Financial Reporting and Independence" you have given a little bit better mark. Tell us what you found there.

Merback - direct

A I think the little bit better mark was because they did have independent CPA reports. Whereas other operations really could never figure out exactly where they were financially, at least they did have the independent CPA's come in on an annual basis and calculate the financial status.

But in terms of the reporting for the use of management to make management decisions, we found it was really a disaster, almost non-existent, that they did not have any -- The CPA and the internal annual reports were only once a year. They were too late, sometimes three, six months after the close of the year. There were no monthly reports, no other management information prepared on a regular basis in terms of their financial status.

We found numerous studies of recommendations through the years recommending the system be improved, and we found these, the best I could determine, to be universally ignored.

The State Auditor report we looked at were also quite critical and found many legal violations of what the City Charter and ordinances said they should be doing in terms of the financial process

Merback - direct

of the City.

Q Mr. Merback, will you turn your attention now to what is designated on your chart as "Water Pollution Control"?

This is sewers, isn't it?

A This is sewers, yes.

Q Will you tell us again about that department in the same manner that you covered the Water Department?

A In terms of services and operating conditions, again probably one of the most visible evidences of poor service is the heavy pollution which has existed for many, many years around the city and the streams going into the lake and the shore line of the lake near Cleveland.

Treatment plants were found to be inadequate, overloaded, and the sewer collection system seriously deteriorating, numerous cave-ins occurring all the time, insufficient capacity of the sewer lines, overflows which are really safety devices are not working which meant discharges are going straight into the streams and lakes; substantial amounts of ground water infiltration in the sewer lines, which means the lines were leaking and the ground water was going into them and filling up the

Merback - direct

system with ground water; significant reports of basement flooding in various parts of the city.

We found they have no regular maintenance inspection programs of the sewer lines, that they really only respond to complaints. We found reports about the equipment, not having the necessary equipment to maintain and operate the facilities and not having adequate repair capabilities.

Q Pass on to the "Planning and Implementation" category.

A Here we looked primarily to the Ohio Water Pollution Control Board which is part of the Ohio Department of Health and has responsibility for what they call discharge into the waters of the state. They must authorize any discharges. They usually come out with permits that are sometimes annual, sometimes other periods.

We went through correspondence between the Ohio Pollution Control Board and the City since about 1959. Consistently the correspondence indicated that the Control Board was criticizing the City and their lack of action and failure to complete the promised projects, promised improvement situations. They criticized the City for not having an overall waste

Merback - direct

water disposal plan or a financial plan.

The City finally promised such a study and made this promise in January, 1965. Then Mayor Carl Stokes presented a plan -- I think it was by Havens & Emerson -- June, 1968, saying, "This is the City's plan." They made little progress and there was again some hearings held and the City in August, 1969, a little over a year later, denied that was their plan, yet offered nothing to replace that Havens & Emerson study.

The Water Pollution Control Board then ordered them to show cause why they were violating their orders -- this was in April, 1970 -- and then ordered that they stop all new sewer hook-ups in the city.

About a month later the City unilaterally lifted this ban and allowed people to begin to hook up sewers again despite the direct orders of the state Water Pollution Control Board.

Legal actions began that were consolidated with some of the suburbs that filed, and it finally resulted in June, 1972, in the sewer operation being regionalized as part of the Cleveland Regional Sewer District.

There is an interesting study about the capital

Merback - direct

situation in Cleveland that was prepared last September by the Urban Institute in Washington who reported in the four years since the formation of the Regional Sewer District they spent 50 percent more for capital improvement projects than the City had spent in the previous 40 years.

Q Pass on to the category of "Financial Condition."

A The situation with their surplus deficit over the 14-year period is essentially the same as Water, generally poor.

Here again, however, they transferred a total of \$600,000 back to the City's general fund. Again we found numerous documentation, statements that the rates charged for sewers were some of the lowest in the country, and again we found some of the same -- not the same but different kind of financial gimmicks in terms of the way the financial results were presented that tended to inflate certain years and make them appear to have a higher surplus than they really did, or less of a deficit.

I think that's about it in finance.

Q Pass on to the next one, the budgeting.

A Again, in budgeting we found in our comparisons in budgeting amounts, the actual amounts we found

Merback - direct

large variances, large differences is in the receipts.

Expenditures, again, typically, they underspent their budget. Two thirds of this underexpenditure was again because they did not make capital expenditures they had budgeted. In fact, here over the 14 years the budget was for \$26 million and they spent \$6 million during those 14 years, 78 percent of the budget.

One thing I forgot to mention on Water but I will bring it up here -- it's about the same -- is their personnel budget, and they do budget for the number of people. The comparison of the actual number of people on the payroll versus the budget again varies widely, particularly in the case of Sewers.. They never seem to plan for an increase or decrease in staff from one year to the next. They always seem to budget what they had last year and yet it was at a time --

For instance, when the Regional Sewer District was formed, when obviously they were going to have less people, the budget did not reflect that but the actual did go down. They just didn't appear to ever be able to anticipate or plan what would happen in the enterprise in terms of the number of people.

Merback - direct

Q Last we deal with "Financial Reporting and Independence."

A Let me dwell a little on the independence aspect there, particularly.

By legal definition in the charter these two enterprises are supposed to be financially independent, and what that means is defined quite clearly. Yet prior to the late 1960's capital improvement expenditures came from the general fund. They never issued a revenue bond and they never carried that capital service or that debt service for capital outlay on the reports for the Division of Water Pollution Control. They really were not financially independent.

In terms of their reporting, we've got the same system deficiencies as in Water. They were part of the same department and the criticisms and problems with their financial reporting were almost identical between Water and Sewer.

One interesting aspect we picked up, and I guess it was from -- or the Operations Improvement Task Force that just came out, that just as a part of their financial reporting during the, what is it now, six years or so that they have been working with the

Merback - direct

Regional Sewer District, they have been doing the billing for them, yet for all that period after a cash flow of some \$36 million, they have never reconciled the records to the Regional Sewer District's records. It's like not reconciling your bank account after running \$36 million through it.

Q Mr. Merback, are there any of the general factors that you found that have a bearing upon your conclusions that you haven't already talked about?

A There are several.

First of all, we found one of the probable causes of some of these problems is the lack of management continuity within the Department of Public Utilities and the two divisions, change of leadership occurring. I think it was on the average of about every three and a half years. This was both a political appointee who was Department Director as well as a civil service employee who was Commissioner.

We had one period when the Water Pollution Control Commissioner was in an acting status for four years. They never made his appointment permanent.

I mentioned before some of the problems in the city, taking actions which we deemed to be not in

Merback - direct

accordance with legal requirements.

This was not a legal review in that sense, but we did have verification of this from some of the State Auditor's findings. This was quite unusual because in most Government operations you have managers look at the law, at the charter, at the ordinance as their bible and they will go to extremes to make sure they are in conformance with that law. That's one of the primary operating criteria they use.

But we found illegal actions in terms of lack of payment for charges by the departments, like power providing power to the water and heat and not making timely payment of those interdepartment charges; lack of bank reconciliation; illegal destruction of utility accounting records for the whole Department of Public Utilities; lack of required information that is called for in the City Charter being submitted with the budget; lack of regular operational and financial reporting that is required by the law; for the last several years no capital improvement plan and budget even though again that is in the charter; lack of required audits that are again in the

Merback - direct

charter. A number of other actions of that nature.

We also looked at the opinions of those who deal with the system and found them generally to be very poor, to be critical far and above what we would normally expect.

Governments get criticized quite a bit in every part of the country. It's a favorite whipping boy, and I have seen this all over the country. But the amount of criticism, the consistency of that criticism and the lack of any real praise for Government we found to be quite unusual here.

This was criticism coming from vendors or companies who must deal with the City, from the suburbs that must deal with the City; State Legislators, primarily revolving around the default situation; the business community; the bankers; and, of course, the news media has been very critical in past years.

The last thing that I think I would like to mention is the political situation in the city and the impact it has on operations, and if I may I would like to read a quote from this Urban Institute Research Report in 1979. They quoted and said that:

"The political institutions have exasperated

Merback - direct

Cleveland's capital improvement problems. The water system has delayed essential projects for years because of disputes with suburban jurisdictions over the rate structure and maintenance responsibilities: Cleveland's city council has been reluctant to grant needed rate increases. Sewer maintenance responsibilities are shared between the city and a regional district, an arrangement which has been troublesome and hard to coordinate."

"The political leaders have failed to take steps needed to preserve the City's financial condition. Citizen demand for low tax rates and low utility rates has been allowed to obscure the shared interest in keeping the Government in sound financial condition. While its form of government organization is traditionally associated with a strong Mayor, the Mayor is in fact quite limited in his actions by the City Council of 33 members, each of whom represents a different ward. In the City Council it frequently happens that the Council President opposes the Mayor's initiative and is unable to put together the 17 votes necessary to reject them and that the Mayor then opposes the

Merback - direct

1 City Council President's initiatives and
2 successfully vetoes them. After four years of
3 battling the Council, Mayor Carl Stokes concluded,
4 'No other major city in the country has such an
5 unwieldy legislative body. Unwieldy is not the
6 word, it is corruptive, it is crippling.' The
7 political system has worked well in keeping taxes
8 and utility rates low -- the tax burden is lower
9 than in almost any other large U.S. City -- but it
10 has not effectively responded to the City's fiscal
11 problems."
12

13 MR. LANSDALE: Thank you. I have
14 no further questions.
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CROSS-EXAMINATION OF DENNIS MERBACK

BY MR. NORRIS:

Q Things are pretty bad in Cleveland, is that your opinion?

A That is not what I said, sir.

Q You think that Mayor Stokes -- do you think he mismanaged the city when he was in office?

A I do not, and our study did not deal with personalities and personal actions. That is not part of measuring the overall management effectiveness.

Q You certainly have identified some fundamental differences between Government operations and private corporations' operations; is that correct?

A I am not sure I know what you are referring to.

Q Well, a lot of things that you testified to, that you found wrong in Cleveland, I take it would not be the sort of thing that you would find wrong in private industry?

A I didn't say that and I don't mean that.

In fact, the basis for my conclusions were other governmental operations.

Q Can you think of any private industry operation that you have looked at during your professional career

Merback - cross

1 that has as many things wrong with it as you described
2 in the last 30 minutes here?
3

4 A Not that I have personally been associated with, but
5 I certainly have heard of some, and they are now
6 bankrupted.

7 Q Tell me, Mr. Merback, when the people of the City of
8 Cleveland have voted not to sell the Muny Light
9 system, would you think that was a criticism of the
10 City's operation?

11 A I am not sure what the basis was that the individuals
12 decided to vote the way they did.

13 That is based on many factors other than the
14 actual facts.

15 Q And you are not a lawyer?

16 A No.

17 Q But you agree, would you not, if the voters in the
18 City tell the administration they want the light
19 plant, then it is up to the Mayor to do the best he
20 can to keep the light plant operating?

21 A To a degree, but I think the way the Mayor presents
22 that proposition and the campaigning that is done
23 prior to that vote, that also that had a large impact
24 on that vote.

25 Q Are you familiar with what the results of the recent

Merback - cross

votes on the issue of, to sell or not to sell, are you familiar with that?

A Generally I am familiar. I know what the final decisions were.

Q What were they?

A Not to sell the City Light Plant.

Q And you quoted at length from this book put out by the Urban Institute called the Future of Cleveland, Capital Plant?

A Yes.

Q How many such studies were put out by the Urban Institute?

A Three so far.

Q What other -- what are the other cities that you refer to?

A New York City, Cincinnati, and Cleveland.

Q Now, are you familiar with what the genesis of those reports was?

A Not specifically, no.

Q Have you got any -- strike that.

Do you know why in these reports, on all of those cities there is more negative information than positive?

A Well, they are talking about the capital crisis in

Merback - cross

America.

Q What was the intended audience for these reports, Mr. Merback?

A Without going back and looking at it, I don't remember.

Q They wouldn't be best sellers on the newsstand?

A No, sir, not typically, no.

Q Now, would you agree with me that you could find as many negative things about the City of New York in this Urban Institute study which is entitled, "The Future of New York City, Capital Plant," as we found in the one about Cleveland?

Would you think that is a fair statement?

A I have read the New York report once, and I would think generally it is fair, but I would like you then to ask the same question about the City of Cincinnati.

Q Tell me about the City of Cincinnati, are there more positive things about Cincinnati than New York City and Cleveland?

A In terms of capital plant, that report indicated yes.

Q Getting back to my earlier question; isn't it a fact that these reports, the one on New York and Cleveland and Cincinnati, that they were written by the Urban Institute with the principal audience the Department of Human Resources, HUD, in Washington,

Merback - cross

1 the purpose being to squeeze as much additional
2 Federal money out of that organization as possible;
3 is that a fair statement?
4

5 A I don't know that for a fact. I suspect you are
6 right, because I recall it was written under a HUD
7 grant; however, I know the Urban Institute like
8 Arthur Young and others cannot turn the facts around
9 and misrepresent them, not if they are going to stay
10 in business.

11 Q But you agree that that is the audience that those
12 reports were directed to?

13 A I assume so.

14 Q You don't dispute that?

15 A I don't disagree.

16 Q When you were given this assignment by Squire,
17 Sanders & Dempsey, were you told that you couldn't
18 go and talk to people in the City of Cleveland
19 about this?

20 A We were not told -- we agreed that we would not.

21 Q Was it your idea that you wouldn't go and talk to
22 people about these terrible things?

23 A I don't really remember where the idea initiated,
24 but we agreed mutually that we would not.

25 Q You mean you might have suggested it, or counsel

Merback - cross

1 might have suggested it?

2 A YEs, that is correct.

3 Q And you have no recollection of where it came from?

4 A No, I don't personally, because I was not involved
5 directly in the very early arrangements of this
6 consulting project. That was done by our people here
7 in Cleveland, in the Cleveland office, and this was
8 fairly well laid out when I became involved to start
9 the project.

10 Q And you do your work in Atlanta for the most part?

11 A I am based in Atlanta, but I probably do less than 5
12 percent of my work in Atlanta, unfortunately.

13 Q Actually you have consulted a very large number of
14 secondary sources in your work, haven't you?

15 A Well, if I understand the word "secondary sources,"
16 meaning other people's reports, yes, that is correct.

17 Q When you criticized the Water Department for having
18 old meters and leaking 25 percent of the water they
19 pump out of the lake, you never took the opportunity
20 to go and talk to the people involved and find out
21 why, did you?

22 MR. LANSDALE:

Your Honor, may we

23 approach the bench?
24
25

- - - - -

1 Merback - cross

2 {Bench conference ensued on the record as
3 follows:}

4 MR. LANSDALE: I passed this up on
5 the interrogation of Mr. Donheiser, but we have a
6 matter here in litigation, and I wonder what the
7 City's position would be if we sent people outside
8 of the discovery process to talk to the employees
9 and representatives of the City in a litigated
10 matter for the purposes of getting information
11 for discovery purposes.

12 I object to the suggestions implicit in
13 these questions. It would have been legally
14 improper for us to deal with the personnel of
15 the City except in the presence of counsel in
16 the part of the discovery process.

17 MR. NORRIS: Well, he is giving --
18 he was given a lot of secondary information that
19 is in the public record.

20 THE COURT: Why don't you use
21 the public records then? I listened to you hear
22 on this examination, and again, I don't know why
23 there hasn't been an objection before.

24 All the questions -- out of all of the
25 questions you asked, maybe you asked one or two

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Merback - cross

that were really relevant questions.

I will sustain the objection. Please
address the issues.

{End of bench conference.}

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THE COURT: You may proceed,

Mr. Norris.

BY MR. NORRIS:

Q In your work papers, Mr. Merback, you made reference
to transfers, and I believe your direct testimony was
that you were talking about transfers that should have
stayed with the Division, either the Water Division or
the Sewer Division.

And you have a chart -- let's see if I can find that
chart.

I think it is a Water Department chart, Mr.
Merback, where you identified transfers that you
find mysterious or unusual.

THE COURT: Are we talking about
the transfer of funds from one department to
another?

MR. NORRIS: Yes, your Honor.

Q I think that the page in the report is page 85,
and you have a table, Mr. Merback, entitled, "Water

Merback - cross

1 and Heat, Transfers to Other Funds."

2
A Yes, sir.

3
Q Is that correct?

4
A That is correct.

5 That is not to the general fund. That is to
6 other funds for services provided as the supposed
7 reason for those transfers.

8
Q Yes. I am looking at -- you described this same area
9 on page 67 that is pictured on page 85, and your page
10 67 says, "Transfer to other funds, accept general
11 funds," and the bottom of the payge you say,
12 "Special accounts are not defined in the Mayor's
13 estimate. It is not at all clear what services are
14 being provided. These transfers total 4.9 million
15 over the 10 years and therefore have a significant
16 effect on the Division's financial results.

17
"There was a \$2 million transfer in 1978 alone."

18
And as I read your report, you are questioning
19 those transfers as being inappropriate or at least
20 not properly documented; is that a fair statement?

21
A We are questioning what those transfers are, because
22 the only definition was simply the title,
23 "Transfer to a Special Account," and that was what
24 was in the Mayor's estimate, the source of this data.
25

Merback - cross

Q Why did you use the Mayor's estimate instead of using the audited financial statements of those two divisions?

A For a couple of reasons:

One was that we could not obtain, let's say, certified public accounting reports for all the years that we wanted to study, and the financial reports put out by the Department of Finance did not show an adequate level of detail.

Because of the many different ways of classifying the accounts, we found that we had to use one that was at least consistent to itself, and so we couldn't fill in CPA reports, let's say, with other data.

The Mayor's estimate we could obtain for the whole time, and we also had the ability then to compare budgets against actual on the same bases, whereas, if we had the budget from the Mayor's estimate and actual from some other source, because the, because of the different way of putting the financial data together, we could not have made that comparison.

There are some other reasons, but those are the primary ones.

Wasn't there another question you had before you got on to why we used the Mayor's estimates?

Q Yes. I am coming back to that.

Merback - cross

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A Okay.

Q Mr. Merback, I had asked Mr. Schmitz to hand you Plaintiff's Exhibit 2113, which is a computer printout with respect to the Water Department, and I ask you to address your attention to the first package on that -- is it line 18 -- and you see the fund numbers, 101, the expenditure code?

A Wait a minute. I am lost.

Q Right on the first page of that document.

A Yes.

Q There are little numbers along the left margin, and about a third of the way down there is the fund No. 101, and do you recognize that number from your study?

A An account number. I don't remember which one it is, but I can find out.

Q Well, that is the Water Department.

A All right.

Q And you see that it is there designated as such, the fund name, "Division of Water and Heat"?

A Yes.

Q And I would ask you please to look at your page 85, which contains the schedule of questionable transfers that you were unable to explain.

Merback - cross

1
2 A Excuse me. That is not what page 85 contains.

3 Q Well, as I understood your testimony, it contains
4 transfers to funds other than the general fund about
5 which you had questioned.

6 A Oh, no. We did not have questions about it.

7 I thought I said that those transfers were there
8 theoretically to pay for services provided by other
9 city departments.

10 I said that among those, we found questionable
11 the extreme variations from year to year in Light
12 and Power, and I didn't say it, but that paragraph that
13 you referred to me before on special accounts, we
14 only raised the question, and we didn't know what it
15 was, because there was no description of special
16 account, particularly since it didn't start until
17 1969 in this case.

18 Q Well, I would ask you to look at the left column on
19 page 85, and this happens to be just for the year
20 1978, and it happens just to be for the Water
21 Department, with similar recordation available to
22 other departments in other years.

23 A Yes.

24 Q The left-hand column is entitled, "Light and Power,"
25 and I ask you to turn to the second page, which is

Merback - cross

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page 1927.

A All right.

Q And two thirds of the way down, the expenditure description in the center of the page is, "The Division of Light and Power"?

A Yes.

Q And over on the left-hand side you find the fund is still No. 101, the Water Department?

A Yes.

Q Now, looking at your page 85 for the year 1978, you have shown on your schedule for transfers to Light and Power, \$2,759,000?

A That is correct.

Q Now, if you will start on page 1927 of Exhibit 3113, you will notice that the last five lines on that page describe certain transactions that are listed here, transfers, October service, November service, and then on the next page you find items that again talk about in terms of the service by different months.

Do you find that?

A Yes, sir.

Q And then over at the top of page 1929 in the middle next to the far-right column you find the year, the

Merback - cross

1 date, expenses, each with an invoice number attached
2 on the right totalling the \$3,755,000.
3

4 I would ask you -- I take it that this detail
5 was not available to you when you prepared your
6 report?

7 A It was not available when we prepared the report, but
8 I am not sure where you are leading.

9 THE COURT: Just a moment. Mr.
10 Norris, I can't find page 85 in this exhibit and
11 I am not following the testimony.

12 These are numbered CEI 672 and 676 and 677.

13 MR. LANSDALE: Counsel is referring --

14 THE COURT: I have got his.

15 MR. LANSDALE: No, sir. I mean the
16 other report. Counsel is referring to Mr.
17 Merback's working papers. They were furnished to
18 him, and we have not submitted a narrative of
19 the exhibit from Mr. Merback. That is not really
20 an exhibit.

21 I will hand you a copy of those papers.

22 MR. NORRIS: I'm sorry, your Honor.
23 I thought that you had that in front of you.

24 THE COURT: All right. Now I am
25 okay. Proceed. I am sorry to have interrupted you.

Merback - cross

Please proceed.

BY MR. NORRIS:

Q Well, what I am asking you, Mr. Merback, you certainly aren't taking the position that the transfers totally \$3,750,000 in the year 1978 were not accounted for from the Water Department to the Division of Light and Power?

A I don't believe that is what I said.

I think that what I said was that if you will take into account on my page 85 that the variations in the total amount of transfers from year to year seems very unusual, considering this, should be a stable operation, and we are going in 1969, 418,000 dollars, and then 1971, and all of a sudden almost a million and a half dollars, and 1972 drops to \$113,000.

Then you go up to \$700,000 the next year, and then on over to a million, and that variation should not exist if accounting records were properly maintained, and if the bills were being paid on time, and if the accounting system was functioning properly.

Q Now, continuing, if you will continue to look at Plaintiff's Exhibit 3113, and let's pick out another example.

Merback - cross

Look on page 1932. The account that you find there is the "Motor Vehicle Maintenance Account."

Do you find that?

A Yes, sir.

Q And are you aware of the fact that the Water Department uses the services of the Motor Vehicle Maintenance Department for servicing its vehicles?

A Yes.

Q And of course there would be nothing wrong with the Water Department paying the Motor Vehicle Department for those services?

A No.

Q And if you look on page 1933, you will find the year-to-date certification, and the year-to-date expenses, \$698,000, which is the amount set forth in the next column on your exhibit, page 85?

A That is correct.

May I just check something a moment?

{After an interval.}

A We had absolutely no problem with that. In fact, on page 67 of my work papers we said, "Motor Vehicle maintenance transfers also vary, but in comparison are relatively consistent."

We had no problem there.

1 Merback - cross

2 Q Now, the one that you did have a problem with was
3 under "Special Accounts"?

4 A The problem with not knowing what that was.

5 Q Let me see if we can find Special Accounts in this
6 printout.

7 If you look on page 1937, you will find the section
8 of the report that commences there is "Expenditure
9 Code 890," and "Expenditure Description, Other
10 Special Accounts."

11 A Yes.

12 Q And the amount of money that we are looking for on
13 your page 85 is \$2,045,000?

14 A Correct.

15 Q And if you look at the middle column, of course you
16 will find a description of the services?

17 A Well --

18 Q And you will notice that there are a lot of repaving,
19 and there is a pressure washer and a mercury vacuum,
20 and tons of rock salt, mortgage bonds, and so forth;
21 do you see that?

22 A I see that, but for a water operation, I am not sure
23 what it is in those amounts.

24 Q Well, before we leave this report, if you would kindly
25 look at page 1939, do you see the total at the bottom

1 Merback - cross

2 of that page which matches your total, \$2,044,745?

3 A Yes, I do.

4 After looking at this, I still have the same
5 question; where are these? There are some big amounts
6 in here; for instance, revenue bonds. Why are they
7 shown in special accounts rather than in the debt
8 service accounts?

9 Now, I am not sure what repaving or something
10 called repairing -- it doesn't say repairing what by
11 whom, or street repairs. Those are very brief
12 descriptions.

13 THE COURT: Ladies and gentlemen
14 of the jury, would you like to have a little
15 stretch?

16 Fine. It is 2:45, and it is that time
17 anyway, and it is a little warm in here, isn't it?

18 Please, during your recess, ladies and
19 gentlemen, don't discuss the case, and adhere
20 to my admonition.

21 We will take a short recess.

22 {Recess taken.}

23 MR. NORRIS: May I approach the
24 bench?

5 THE COURT: Yes.

Merback - cross

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{Bench conference ensued on the record as follows:}

MR. NORRIS: I only have one copy, and I wanted to exhibit to counsel, to exhibit these to counsel and to the Court at the same time.

I am going to show the witness vouchers that appear in this listing, and I don't have other copies, so if you would look them over, I would appreciate it.

{After an interval.}

MR. LANSDALE: I have no objections to those.

THE COURT: All right.

{End of bench conference.}

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BY MR. NORRIS:

Q Mr. Merback, I have handed you before the break Plaintiff's Exhibit 3113, and just at the break we were looking at the special account analysis.

Would you kindly turn to page 1941 of that exhibit, and I think you were questioning what the items marked "Repaving" might have referred to; is that correct?

Merback - cross

A Yes.

Q Would you kindly look on page 1941, and as near as I can make out on the right column, the small number there, the warrant number B-215982.

Do you see that?

A Yes, I do.

Q And it is in the amount of \$8,175.06, and it is for repaving; is that correct?

A That is correct.

Q Now, I have also had Mr. Schmitz just hand you six sets of vouchers from the Water Department's files, and in the upper right-hand corner there is a little number one?

A Yes, sir.

Q And do you find -- would you kindly examine that packet marked "No. 1" and see if it is the underlying data that support the \$8,075.06, that support that entry that we just identified?

A Yes, they appear to be invoices from the Division of Streets to the Water Department with some addresses -- well, some other substantiating data.

Q And subject to your right to check on this information, let me tell you that I am advised that when the Water Department needs to dig up a main or do other repair,

Merback - cross

1 that when they are done, they of course have to repave
2 or pay for the repaving, and that Item No. 1 fits into
3 that category, and would that seem to be an appropriate
4 explanation to you?

5
6 A Yes, it does.

7 Q Would you look back at page 1941, and above that item
8 that we have just looked at, and if you count up to
9 the seventh item up, it is number 213087.

10 A Yes.

11 Q And the amount of \$4,273, and look at packet No. 2
12 and see if that is, from an accountant's point of
13 view, adequate back up for that entry?

14 A It looks fine.

15 Q And a different kind of entry in this same special
16 accounts column is on the preceding page, right about
17 in the middle.

18 See if you can find on page 1940 on the right-hand
19 column, see if you can find Warrant No. 194009.

20 A They are not in numerical order.

21 Q No, they are not.

22 A Oh, I see it.

23 Q And that is identified as permits in the amount of
24 \$5,950.

25 Do you see that?

Merback - cross

1
2 A Yes, I do.

3 Q And you should have a little packet up there marked
4 No. 4, and let me tell you that I am advised that when
5 the Water Department needs to make a repair that
6 involves going into streets, it is necessary to pay
7 a permit fee, because the employees of the other
8 department need to be on the job to determine that
9 it is done properly, and I would ask you to verify if
10 you would please the totals in that supporting
11 packet and tell me if it is the same amount as shown
12 on these other printouts?

13 A Well, I can't verify the totals, but I can tell you
14 that the covering sheet here does check.

15 Q And there are individual addresses?

16 A Yes.

17 Q With respect to which the permits were being sought in
18 the back-up data; is that correct?

19 A That is correct.

20 Q And then if you will move up to the fifth item on
21 page 1940, this goes to another question that you
22 had, and this is entitled, "Mortgage Bond," in the
23 amount of \$110,833.33.

24 Do you see that?

25 A Yes, I do.

Merback - cross

Q And there should be a packet there at the desk marked No. 5.

A I see that.

Q And in connection with this, are you aware of the \$80 million bond issue sold for the Water Works in 1977?

A Yes, I am.

Q And are you aware of the need to build up a fund balance of \$3-1/2 million pursuant to the mortgage indenture?

A I wasn't aware of that dollar, but I know that fund balance must be built up.

Q And if you look at the voucher that is in the packet, No. 5, do you find an entry of \$3-1/2 million, showing a \$2 million -- I think \$2,170,000 to be paid off, to be paid out of bond funds, and then the balance to be paid in installments?

A Yes, I do.

Q And do you find that that installment on that particular piece of backup is in the amount of \$110,833.33?

A Yes.

Q And does that match the computer printout on page 1940?

Merback - cross

A Yes, it does.

Q Did that bundle have an identification as to which installment payment that was?

A The second.

Q Would you turn the page, please, to 1941, and it is about the tenth item down from the top of the page, and you will find a number in the right column, 212121?

A Yes.

Q And there should be another packet up there marked B?

A Yes.

Q And tell me whether or not; is that the eighth installment payment in that year?

A That is correct.

Q And would you find anything irregular in building up to the fund balance in an installment basis with \$100,000 being paid each month?

A No, I do not.

Q You also questioned the -- looking at again your page 85, Mr. Merback, I think one of your questions was with respect to the left column under "Light and Power," and I believe you pointed to the swings in the amounts, and 1972 was \$113,000, and 1972 was \$702,000, and 1974 jumped up to over \$2 million,

Merback - cross

and you had a question about that?

A That is correct.

Q During your investigations, did you learn that the Water Department in its pumping stations was electrifying its pumping stations during the early and mid-1970's?

A That was when they were changing over from the steam.

Q That is correct; and I am advised that this big swing was with respect to additional purchases of power that the Water Department paid to Muny Light in conjunction with phasing out the steam and purchasing power from Muny Light?

A Well, I also identified the previous year as being part of that exception, which was a million four hundred thousand dollars in this case.

Now, if you look at the pattern starting in 1969, which is the first time they had set this up, it went 400-18, 5-56, a million and a half, and clear down to 100-13, and your explanation doesn't seem to say why we went down and then back up again.

Q You realize that these figures that you presented on page 85 are on the basis of a cash budget, not accruals?

A Yes, I do.

Merback - cross

Q And the period of time for which a payment is made might be a prior period of time.

Just because it appears in a given year, that was the year that the money was actually paid; isn't that correct?

A Well, if their accounting system and payment of dues is not current, it could end up in the wrong period; that is correct.

Q And are you aware that this changeover from steam to electrification didn't happen all at once, but it happened over a period?

A I would assume so, yes.

Q You drew a particular attention to the two-year term for Mayor and the 33 Councilmen.

Does that somehow impact upon mismanagement for either the Water Department or the Sewer Department?

A I said that it did in the sense that the Council and the Mayor are essentially the Board of Directors and the President of the particular operation, and that it impacted in my opinion in several ways.

It impacted in terms of lack of continuity; in terms of the political need to be reelected every two years, and therefore top management not being as concerned with long-range issues as opposed to

Merback - cross

short-term highly visible issues, and in that sense, yes, I felt it did have an impact.

Q And of course the Council, the size of Council is set forth in the charter?

A Yes.

Q And the people in the jurisdiction vote on the charter, don't they?

A They vote on the charter.

Q If that is to be changed, wouldn't it take a vote of the people?

A Yes, but that doesn't make it right.

Q You made reference to a 25 percent loss in the Water Department's operation during your direct examination.

Do you recall saying that?

A Yes, I do.

Q Now, where did you get that information?

A I am fairly sure I know -- let me check a moment, and I will be able to tell you specifically.

{After an interval.}

A I got that from the recently completed Operations Improvement Task Force Report which was prepared by a large group of citizens that requested of Mayor Voinovich in the later part of this year -- and it was issued about the beginning of the summer.

Merback - cross

1
2 Q And do you know -- strike that.

3 Did you read the opinion of the Court of
4 Common Pleas with respect to the order that was
5 entered many months ago with respect to transferring
6 the Water Division away from the City of Cleveland?

7 Do you recall reading that opinion?

8 A Several times, yes, sir.

9 Q And that 25-percent loss factor was certainly made
10 reference to in that opinion, wasn't it?

11 A Yes; and that is probably the other place that I got
12 it.

13 Q Are you aware that that decision of the Court of
14 Common Pleas, upon review by the Court of Appeals
15 of the Eighth District here in Cuyahoga County
16 last month, was reversed?

17 A I am aware that it was reversed in terms of
18 jurisdictional grounds, but not on the basis of
19 finding of facts, in my understanding.

20 Q You are not aware then that the Court of Appeals
21 had occasion to comment on the outdated information
22 that is contained in the Court's opinion?

23 A I read that opinion by the Court, and my recollection,
24 if I need to have it refreshed, I would hope you
25 would ask me to, is that there was simply a request

Merback - cross

1
2 for the updating on the current status, and to see
3 whether or not the City had finally made any of the
4 improvements that the Judge found they should have
5 been making.

6 Q In any event, you are fully aware that the earlier
7 ruling by the Court divesting the City of the
8 Water Department had been reversed?

9 A Under the conditions that I just stated.

10 Q But nevertheless reversed?

11 A Yes.

12 THE COURT:

He answered that, Mr.

13 Norris.

14 Q I have handed you Plaintiff's Exhibit 3115, which
15 sets forth municipal revenue bond ratings by Standard
16 and Poors and Moody's.

17 Do you have that in front of you?

18 A Yes, I do.

19 Q And this information actually deals with the airport,
20 Muny Light, and with the waterworks; correct?

21 A Yes.

22 Q And Standard & Poors in 1977, 1978, and 1979, gave
23 the waterworks an A rating, whereas Moody's gave
24 the waterworks a B-A, C-AA and C-AA in those three
25 years?

Merback - cross

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A That is what it says.

Q And the waterworks dropped to A minus under Standard & Poors in 1980 and continued to C-AA rating in Moody's in 1980; is that correct?

A That is what it says.

Q Do you have any reason to dispute the accuracy of these bond ratings, these bond figures from your own experience?

A No, I do not.

MR. NORRIS:

No further questions.

MR. LANSDALE:

No questions.

THE COURT:

Thank you. You may

step down, Mr. Merback.

MR. LANSDALE:

Mr. Ginn, please.

- - - - -

1 R O B E R T M . G I N N ,

2 having been called as a witness on behalf
3 of the defendant, after having been duly
4 sworn, was examined and testified as follows:

5
6 D I R E C T E X A M I N A T I O N O F R O B E R T M . G I N N

7
8 B Y M R . L A N S D A L E :

9 Q Would you state your name and address, please?

10 A Robert M. Ginn, 3279 Ingleside Road, Shaker Heights.

11 Q You better move the gadget up a little higher.

12 And with whom are you employed, Mr. Ginn?

13 A The Cleveland Electric Illuminating Company.

14 Q What is your position?

15 A President and Chief Executive Officer and Director.

16 Q Will you state your education, Mr. Ginn.

17 A I grew up in Detroit, and I graduated from the
18 Detroit, Michigan public schools, and after
19 three years in the Army I graduated from the University
20 of Michigan in 1948 with a Bachelor and Master of
21 Science degree in electrical engineering, and I had
22 taken a job with the Illuminating Company, or
23 committed to take one partway through graduate school,
24 so the latter part of my graduate school education
25 included a fair number of courses in public utility

Ginn - direct

economics and finance.

Subsequent to joining the Illuminating Company I attended Case Institute of Technology, advanced management program in the mid-50's, and the Harvard Graduate School of Business, advanced management program in 1965, and currently I serve on an advisory committee for the Dean of the School of Management at Case Western Reserve.

Q Mr. Ginn, will you give us your employment history with the Illuminating Company.

A I started with the Illuminating Company in 1948, and I spent about three years in a series of staff positions in finance, and in 1951 I was made manager of Technical Studies, and in 1953 that responsibility was expanded to include rates and technical studies, essentially the job Mr. Bingham has today.

In 1955, from 1955 through the year 1959, I served one year as Superintendent of Underground Construction and four years as Superintendent of Overhead Construction, and I had full responsibility during those years, during the underground period, of all underground construction and operations for underground lines, and during the overhead period, the same responsibilities for overhead line

Ginn - direct

1 construction, including distribution and transmission
2 facilities.

3
4 About January 1st of 1960 I became Controller
5 with the responsibility for financial planning and
6 rate making and auditing and taxes and most of the
7 financial planning areas of the company.

8 In 1962 I became Manager of the Area
9 Development Department, and our Market Group, where
10 I had the responsibility for our activities in an
11 attempt to attract other companies to the
12 Cleveland area.

13 In 1963 I became Vice President of what is now
14 called Administrative Services, which is a job that
15 includes the computer operations and systems and
16 personnel and union relations and purchasing.

17 January 1st, 1970, I became Executive Vice
18 President, and in the spring of 1977, I became
19 President, and in 1979, June of 1979, when Mr.
20 Rudolph retired, I became Chief Executive Officer.

21 Q Mr. Ginn, what kind of competition has the
22 Illuminating Company faced during the period when
23 you have been part of the management of the company?

24 A There are several kinds of competition that we face.

25 The first is what lawyers might call franchise

1 Ginn - direct

2 competition, and this is the right to have a
3 municipality to tell us in effect to get lost, that
4 they don't like our service and they will provide
5 service some other way, and that is, I guess more
6 threatening than has happened.

7 I don't remember any time in history when the
8 company was confronted with that kind of a decision.

9 Secondly, and certainly the most prevalent
10 kind of competition, particularly several years ago,
11 was with other forms of energy.

12 Residential use -- you could cook by
13 electricity or gas, and so we have an energy form of
14 competition, and transportation, and public
15 transportation, and buses can be electrified or run
16 with gasoline.

17 In commercial usage you could air-condition
18 buildings with gas or electricity.

19 In many industrial operations it involves heat,
20 and you use oil or gas, and you can use electricity
21 and conduction heating, and so forth; and all these
22 kinds of competition tend to be price sensitive.

23 Usually the user does not care. They need the
24 energy, and the end use, so in these areas, why, we
25 have to be particularly price sensitive.

1 Ginn - direct

2 A third kind of competition was one that I
3 certainly became familiar with in my period in the
4 Area Development, and that was area competition.

5 We compete in northeast Ohio with other areas
6 of the country, other areas of Ohio.

7 The cost of electricity does not tend to be a
8 factor in this kind of competition.

9 I don't recall an instance in my history with
10 the company where a company chose to locate here
11 rather than someplace else solely because of the cost
12 or even to a major degree because of the cost of
13 electricity.

14 Adequate supplies of electricity are important,
15 and the factor that tends to be important in this
16 area are the quality of the work force and the
17 number and skills of the people and the availability
18 of water and the availability of land, and the
19 factors like that, and transportation, certainly
20 transportation for raw materials and transportation
21 to markets.

22 A couple of examples of instances of that kind
23 of competition might be our efforts which were successful
24 in bringing several Ford Motor Company plants to this
25 area in the early 1950's, the Brookpark complex up

Ginn - direct

at the airport, the Big Four plant out in Walton Hills.

Other examples would be the chemical complex in northeastern Ohio near Ashtabula where those companies came in large part through the efforts of the Illuminating Company.

Q Go ahead. I didn't mean to interrupt you.

A A fourth kind of competition is one that, unless you are involved in the business, you probably wouldn't know very much about.

Regulations serve as a substitute for competition, serves well in many areas, but it deprives your employees of the day-to-day kind of competition that companies that are constantly in the marketplace face.

The baker has his loaves of bread on the shelves every day and has to compete and has contact with the customers. When someone buys an electric range or moves to an area, once they have made that commitment, there is not the intense competition one might face on a day-to-day basis.

So there has grown up, particularly since the 1950's when some of the leaders in the industry, and I think probably our company was a forerunner in

1 Ginn - direct

2 this -- Elmer Lindseth and Ralph Besse -- in
3 developing a system of competition among our people,
4 and we developed a complex which started fairly crude
5 but, through the use of computers, has become highly
6 sophisticated in developing a measure of performance
7 of our company versus leading companies in the
8 industry, companies that have a reputation for being
9 well-managed, and we particularly use this in areas
10 where meter reading, line construction, the kinds
11 of activities where the customer is involved to keep
12 our people on the ball.

13 I think it is the kind of competition that
14 resulted in, for example, running races, the human
15 beings running races at constantly lower speeds.
16 We started out with the 4-minute mile being unbeatable
17 and it's gradually dropped because people have
18 something to target against. On the other hand,
19 horse races, horses can't understand and times for
20 races are the same as they were years ago.

21 So we think this serves our customers well in
22 continuity, keeping our people attempting to lower
23 the cost of doing business and giving better
24 service.

25 Those examples of competition would be typical

Ginn - direct

of any utility I know of in this country.

We face a fifth kind of competition in our area which is very different and unique in this area, one of the unique places in the world, I believe, from my knowledge, where we have direct door-to-door competition in some areas of the City of Cleveland in the provision of electric service.

All the other kinds of competition I talked about tend to make service better, tend to make costs less, they tend to benefit the customer. The last kind of competition, this direct door-to-door competition in the service of electricity to customers works the opposite way. It tends to make costs higher. Customers are hurt. Customers of both entities pay higher costs than they otherwise would because of duplicate facilities and because of duplicate manpower. It is destructive and wasteful.

Q Will you please explain a little bit further what you mean by those last comments about duplicating competition and outlying somewhat the Illuminating Company's position with respect to responding to it?

A Well, I guess our position would be the same as anybody faced with the same circumstance. When you

1 Ginn - direct

2 are an electric utility and you are serving in an
3 area, you have your lines going down the street and
4 the competitor's lines going down the street. You
5 have your meter reader reading meters, you have your
6 line crews to provide service when a storm comes or
7 when somebody's fuse blow and they need service.
8 You've got to have those facilities and people there
9 to serve the customers that you have.

10 When you compete with somebody on this same
11 street for the same business, when you tend to lose
12 a customer, then your costs go up to serve all the
13 rest of the customers because you still have to
14 have the lines, you still have to have the meter
15 readers, you still have to have the line crews.
16 If you lose all the customers in the area, then
17 you suffer a loss because you have to abandon the
18 facilities.

19 It doesn't make any difference who "you" is.
20 In entities of competition when customers shift
21 back and forth, the fact that the lines can only
22 serve half the people or the meter readers can only
23 serve half the people, or 40 percent or whatever, it
24 tends to increase the cost for both companies, for
25 both entities.

1 Ginn - direct

2 Q Does the Illuminating Company have to respond to
3 this kind of competition?

4 A We certainly do have to because if we did not respond
5 to this kind of competition, our costs would go up
6 and we would suffer losses. So it is essential that
7 we respond.

8 To the best of my knowledge, we have never
9 initiated this kind of competition. I don't recall
10 an instance, certainly in my history in the company,
11 where we have built a line into an area we weren't
12 already serving, where we have started this
13 destructive kind of competition.

14 We have responded to it but we haven't started
15 it.

16 Q Mr. Ginn, if you feel you must respond to it, how is
17 it your rates have not been reduced in the area of
18 competition to meet those of the Muny Light?

19 A We couldn't afford to do that. It would just be too
20 costly to the company.

21 Q I gather, Mr. Ginn, that you would like to see Muny
22 Light out of business?

23 A We certainly would. I respond strongly and
24 unequivocally yes to that.

25 Q Why, then, did CEI voluntarily provide assistance

1 Ginn - direct

2 to Muny Light when the City in late 1969, Christmastime,
3 and early 1970 suffered a serious loss of its
4 generating capabilities with resulting blackouts?

5 A Basically, two reasons we did that, both of them
6 really in the interest of our customer and stockholders
7 and our employees, although I think in the long
8 range run it certainly benefitted the taxpayers of
9 the City of Cleveland and the customers and
10 employees of Muny Light.

11 Those two reasons are, first, I talked about
12 area competition and a long, extensive, serious
13 blackout to a large segment of Cleveland, written
14 up in the New York Times or Wall Street Journal,
15 which it certainly would have been, would not have
16 been beneficial to us in our attempts to locate
17 business in Northeastern Ohio. It would have been
18 detrimental to the overall impact on the City of
19 Cleveland.

20 Secondly, we can't be insensitive to public
21 pressure, locally. We are citizens of the community.
22 I am sure that the local media would have -- I guess
23 I won't use the word I was going to -- but would
24 have made some very strong statements with us about
25 what they would have thought of our actions in, for

1 Ginn - direct

2 example, leaving a section of Cleveland dark New
3 Year's week or something like that. We just couldn't
4 have taken the heat.

5 MR. LANSDALE: I have no further
6 questions.

7 THE COURT: Cross-examination?

8 - - - - -

9
10 CROSS-EXAMINATION OF ROBERT M. GINN

11
12 BY MR. NORRIS:

13 Q Mr. Ginn, would you say that the gas lines that go
14 down the street that your electric lines run down
15 are duplicate facilities?

16 A No.

17 Q They are competitive facilities, aren't they?

18 A Well, we compete with the gas companies, yes.

19 Q And there are many streets in Cleveland where there
20 are gas lines under the streets and your lines are
21 overhead?

22 A I suspect there is no street in Cleveland where
23 there aren't both lines. Some places we have
24 electric lines underground.

25 Q Mr. Ginn, my notes suggest you weren't aware of any

Ginn - cross

1 other area in the electric utility business where
2 there was door-to-door competition like there was
3 in Cleveland. Is that your testimony?
4

5 A Not as extensive as it is in Cleveland.

6 Q What are the other areas you are aware of where there
7 is door-to-door competition between a privately
8 owned utility company, such as CEI, and a
9 municipally owned utility company such as Muny Light?

10 A There are lots of places where there are municipally
11 owned utilities. I am aware of door-to-door
12 competition in a minor area of Columbus. I think
13 Columbus has 400 or 500 customers, private customers.
14 At least, it used to.

15 Detroit at one time had some door-to-door
16 competition, although that was resolved by
17 agreement between the municipal system and the
18 Detroit Edison Company and, in fact, adopted a
19 plan much like Mr. Lindseth and Mr. Besse proposed
20 to the Mayor of Cleveland years ago.

21 Seattle has had door-to-door competition and
22 in most cases there, as I understand, it has ended
23 up with one or the other company squaring up and
24 buying territories.

25 Los Angeles, of course, there is an extensive

Ginn - cross

municipal system but they don't compete with
California Edison for individual customers.

Q In the Seattle system the municipal system
actually bought out the Puget system, did it not?

A Could be.

Q You are not aware of that?

A Yeah. I said there was squaring up of territory
where, rather than competing the City of Seattle
bought part of the Puget Sound Power and Light.

Q And Puget Sound does not operate within the City of
Seattle now; is that correct?

A I am not sure exactly what their boundaries are.
At one time they had part of the city. Now, they
don't have any.

Q You said in Columbus you thought the municipal
system had 400 private customers?

A 400 to 500 was my recollection. Certainly nowhere
near 40,000.

Q I'm not sure either but --

A Mr. Bingham would know.

Q Would you believe it was closer to 7,000 or 8,000
instead of 400?

A I couldn't tell you today. I used to know these
figures pretty accurately years ago when I was in

Ginn - cross

1 the rate activity. But 7,000 isn't 40,000 to 50,000.

2 Q We have door-to-door competition here in Cleveland.

3 You have mentioned door-to-door competition in
4 Columbus and there's another area close to this
5 community we live in that also has door-to-door
6 competition with your company; right?

7 A You are talking about Painesville?

8 Q Yes.

9 A Well, most Painesville customers are in the city.
10 They have a few lines that go out but it's not
11 really door-to-door competition. I don't recall --
12 It's years since customers have jumped back and forth
13 like here.

14 Q I'm not restrcint my questions to the City of
15 Painesville. I'm talking about the 12-square mile
16 area adjacent to Painesville where there is door-to-door
17 competition. That's correct, isn't it?

18 A Painesville has lines outside the City but it's nothing
19 like Muny Light system has competing in the City of
20 Cleveland.

21 Q I'm just trying to find out if you know there is
22 door-to-door competition to some extent out in that
23 area.

24 A To a very limited extent.
25

1 Ginn - cross

2 Q When your costs go up and they go up sufficiently,
3 you do have access to the Public Utilities
4 Commission for rate increase proceedings, do you not?

5 A Yes. If the costs go up we have to raise the rate
6 and the customers have to pay our rates.

7 That's the point I was getting at.

8 That's why this competition is destructive and
9 costly. I am concerned about the customers rather
10 than myself.

11 Q You are not concerned about the profit to shareholders
12 at all?

13 A Sure, I'm concerned about the profit to shareholders
14 but, eventually, our costs must be reflected in our
15 rates.

16 Q And if Muny Light were to be put out of business in
17 the City of Cleveland ultimately, that would enhance
18 the profits of your shareholders, would it not

19 A I think the way rates are regulated in Ohio it
20 wouldn't make much difference to shareholders because
21 we are regulated on a strict cost basis. It would
22 reduce the cost to the City of Cleveland.

23 Q You don't think it would have any impact on the
24 profit at all?

25 A Very, very little. Might be lowered in the first

1 Ginn - cross

2 few years as far as earnings per share basis.

3 Q You mentioned you provided help to the City of
4 Cleveland that at the time of the Christmas Blackout
5 in 1969.

6 A Shortly after that.

7 Q Well, it started in February of 1970?

8 A Yes.

9 Q But there was a major blackout in Christmas week
10 prior to the time service commenced; is that right?

11 A Well, there were a series of -- Service was
12 restored relatively quickly, but this was not
13 something where people were out of light for three,
14 four, five days. But there was indication to us
15 that if this kept on, we could very well have a
16 catastrophic blackout and there might be sections
17 of Cleveland which might be out until they repaired
18 a generator and it might be out weeks or months.

19 Q There were some monumental traffic jams; you recall
20 that?

21 A Certainly. Muny Light serves Public Square and my
22 office looks out on Public Square.

23 Q When your company did help, it was provided without
24 parallel interconnection?

25 A We used load transfers in that case.

Ginn - -ross

1
2 Q And your company has refused to give Muny Light
3 interconnections many times when it has been
4 requested; is that correct?

5 THE COURT: Sustain the
6 objection.

7 Mr. Norris, why don't you limit yourself
8 to the direct examination as I have told you
9 so many times? I don't know why you insist on
10 going afield like this.

11 Q With respect to the westerly sewage plant and the
12 matter of duplicate facilities you testified to on
13 direct examination, is it a fact that Muny Light is
14 now removing the existing line to the westerly sewage
15 plant while you are building new lines to that
16 plant?

17 A I haven't the vaguest idea what Muny Light is doing
18 in the westerly sewage plant.

19 Q Do you know whether CEI is building new lines to
20 that plant right now?

21 A I could find out for you. I don't know.

22 THE COURT: Redirect?

23 MR. LANSDALE: No questions.

24 THE COURT: Thank you. You may
25 step down.

1 Call your next witness.

2 Gentlemen, would you approach the bench
3 here for a minute?

4 - - - - -

5 {Bench conference ensued on the record as
6 follows:}

7 THE COURT: How many more witnesses
8 do you have?

9 MR. LANSDALE: This is my last
10 witness coming up.

11 THE COURT: One question that has
12 to be resolved and that is I want to entertain
13 arguments on the issue of the Miller stipulation
14 and I want an indication of plaintiffs as to,
15 pending my ruling here, on when it would be
16 appropriate to read the stipulations.

17 MR. NORRIS: I would think --

18 THE COURT: Because if that
19 occurs, this may affect the presentation on
20 the part of the defendant.

21 MR. LANSDALE: It possibly could.
22 I haven't made up my mind.

23 MR. NORRIS: Your Honor, we are
24 perfectly willing to wait until after Mr.
25 Gerber's testimony. We were prepared to go

1 forth with the argument, or we could do it
2 first thing Monday morning, whatever your Honor
3 desires.

4 THE COURT: What is Gerber going
5 to testify to?

6 MR. LANSDALE: He's an economic
7 witness.

8 THE COURT: He will probably take
9 some time. You can start him and qualify him,
10 then we will have arguments on the other.

11 MR. NORRIS: This afternoon?

12 THE COURT: Yes. I want to
13 finish it.

14 {End of bench conference.}

15 - - - - -
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25

A B R A H A M G E R B E R,

a witness called on behalf of the defendant,
being first duly sworn, was examined and
testified as follows:

DIRECT EXAMINATION OF ABRAHAM GERBER

BY MR. LANSDALE:

Q Will you state your name and address, please?

A Abraham Gerber. My business address is 251 Royal
Palmway, Palm Beach, Florida.

Q By whom are you employed, Mr. Gerber?

A I am employed by the National Economic Research
Association.

Q What is the National Economic Research Association?

A The National Economic Research Association is a firm
of consulting economists that provides consulting
services to industry, principally government
agencies, throughout the country and a large part
of the work involves consulting with public
utilities.

Q Mr. Gerber, will you state your own education, please?

A Yes. I received a Bachelor's degree from Columbia
College in 1948, received a Master's degree from
Columbia immediately thereafter and did additional

Gerber - direct

work at Columbia for my doctorate and went on to the new School for Social Research on a graduate scholarship for additional graduate work, all in economics and statistics.

Q Mr. Gerber, will you give us your employment history since you came out of school?

A Yes. Upon leaving school I went to work for the United States Government for about six months or so with the Department of Commerce, Office of Business Economics, and following that I moved on to the Office of the Chief Economist in the Bureau of Mines of the Department of the Interior where I was employed for about two years.

Following that I joined American Electric Power Service Corporation in the System Planning Department preparing load forecasts and generally engaging in system planning activities and providing assistance to the president of the company.

Q May I stop you right there?

Please tell us what is American Electric Power Service Corporation.

A American Electric Power Service Corporation is the service company subsidiary of American Electric Power Company, which is a holding company that has

1 Gerber - direct

2 among its subsidiaries Ohio Power Company,
3 Appalachian Power Company, Indiana-Michigan Electric
4 Company, Michigan Power Company, Kentucky Power
5 Company, Kingsport Electric Company, Wheeling
6 Electric Company -- Wheeling Power Company, rather,
7 and other subsidiaries.

8 The service corporation is the subsidiary that
9 provides the engineering, accounting, legal and
10 other types of services to the operating subsidiary.

11 Q All right. Continue now with your employment
12 history after you left American Electric Power.

13 A A few years after I joined American Electric Power
14 I formally became Assistant to the President at which
15 job I remained until the President retired some years
16 later, at which time the company established a
17 Committee of the Board of Directors called the
18 System Development Committee on which the retired
19 president became Chairman and I became secretary.

20 It was the function of this committee of the
21 Board of Directors to explore new avenues of
22 development for the system, technological and
23 economical development.

24 Following in a few more years to that
25 committee, and I guess it was in 1967, I joined

Gerber - direct

National Economic Research Associates as a senior consultant and a year or two later became Vice President. I am Senior Vice President of that firm now.

Q What has been your primary function or activity since joining NERA?

A I have done a lot of things since joining NERA, but, principally, my activities have been involved in all aspects of electric utility work, including antitrust issues involving electric utilities, planning problems for various companies, load projections, analysis of fuel requirements, studies of fuel requirements for electric generation, analysis of nuclear power development and that sort of thing.

Q You keep mentioning utilities. Have you done any work in this connection for any governmental agency?

A Yes. I have been a consultant to Tennessee Valley Authority in several projects.

Q Mr. Gerber, have you testified before on the general subject of utility economics and antitrust problems respecting utilities?

A Yes, several times.

Q Mr. Gerber, what were you asked to do to prepare

Gerber - direct

yourself to testify in this case -- or, rather, not to do but what were you asked to testify to, the subject matter?

A Well, I was asked to review the materials available regarding the circumstances here in Cleveland and to be prepared to analyze the competitive relationships between CEI, that is, Cleveland Electric Illuminating Company, and the Municipal Electric Light Plant in light of the basic economic factors that affect the structure and performance of the electric utility industry.

Q What, in your view, Mr. Gerber, are the factors which have governed the economics of the electric utility industry?

THE COURT:

Mr. Lansdale,

perhaps this would be an appropriate time for us to break for the weekend.

The jury has a number of exhibits to review and, accordingly, ladies and gentlemen, we will adjourn for the weekend. You are again reminded you are not to discuss the case either among yourselves or with anyone else at least until such time as the matter is submitted to you for your final deliberation and judgment upon the

1
2 instructions of the Court. Until that time
3 please keep an open mind until you have heard all
4 the evidence and the instructions of the Court.

5 With that, ladies and gentlemen, you are
6 free to retire to the jury room. The exhibits
7 of the day will be submitted to you for your
8 examination. You will be thereafter free to go
9 and return on Monday morning at 8:45. Have a
10 nice weekend. Good night.

11 {The jurors left the courtroom.}

12 - - - - -

13 {The following proceedings were had in the
14 absence of the jury.}

15 THE COURT: Gentlemen, I have the
16 following exhibits tendered without objection:
17 Plaintiff's Exhibit 2351, 2550, 3109, and they
18 may be admitted. The following exhibits to which
19 objection has been taken are 3110, 3111, 3112
20 which I would like to see.

21 State your objection to 3110, 3111 and 3112.

22 MR. MURPHY: Your Honor, our
23 objection is the characterization on the exhibit
24 to the effect that the better the ratio, the
25 stronger the balance sheet, or something of that

1
2 sort. I forget the exact language. Mr.
3 Dunheiser testified the opposite.

4 Other than that, we have no objection to it.

5 THE COURT: That may be stricken
6 and the exhibit may be admitted.

7 That's it.

8 MR. NORRIS: Could we have a
9 brief recess before we go into the arguments?

10 THE COURT: Sure.

11 MR. MURPHY: Your Honor, I have
12 one other matter, if I might.

13 We would like to offer into evidence CEI
14 Exhibit 370. I spoke with Mr. Hjelmfelt about
15 this earlier today. I don't think there is an
16 objection.

17 MR. HJELMFELT: We are still checking
18 on that. If we could respond on Monday --

19 MR. MURPHY: Oh, I'm sorry.
20 Monday's fine, your Honor.

21 THE COURT: Everybody is free to
22 take a drink of water. Since I don't need one,
23 I will sit here and wait.

24 {Short pause.}

25 THE COURT: Gentlemen, the Court

1
2 indicated, I believe, yesterday when the City
3 renewed its motion concerning Stipulations
4 22b through and including 241, requesting the
5 Court to read the said stipulation to the jury.

6 At that time the Court indicated that it
7 would reserve its ruling as to that motion,
8 indicating that in light of the evolution of
9 the evidence since the Court's ruling as to the
10 admissibility of that exhibit as contained in
11 the stipulation coming within the Noerr-Pennington
12 doctrine, it may be appropriate for the Court
13 to reconsider its heretofore issued ruling.

14 More specifically, gentlemen, the Court's
15 concern is founded upon the following line of
16 inquiry on cross-examination of Mr. Fowlkes.

17 "Mr. Fowlkes, to your knowledge, had the
18 CEI done anything to impede Muny Light's ability
19 to complete the construction work at its end?

20 "Not to my knowledge."

21 That's at page 5270.

22 On page 5281:

23 "Mr. Fowlkes, at the time of your visit to
24 Cleveland in January, 1979, to your knowledge,
25 had the CEI done anything to impede the City's

1 ability to do its work on the 138 KV
2 interconnection?"

3 The answer:

4 "No, to my knowledge."

5 That examination and those answers, taken
6 into consideration with the cross-examination of
7 Mr. Harold Williams by Mr. Hjelmfelt on page 5033
8 of the transcript:

9 "Question: Mr. Williams, is it your
10 testimony that CEI took -- did absolutely nothing
11 to delay construction of the 69 KV intertie?

12 "Answer: Did absolutely nothing. I can't
13 verify that now.

14 "Question: Well, did it take any action to
15 delay that you were aware of?

16 "Answer: I'm not aware of any conscious
17 effort to delay the 69 KV interconnection once
18 it was ordered by the Federal Power Commission
19 and once it was determined that the City was
20 going to pay the cost."

21 Continuing at page 5034:

22 "Question: You know of nothing that CEI
23 did, directly or indirectly, to slow down or
24 delay or interfere with the City's construction
25 of the 69 KV line?

1 "Answer: That is correct."

2 Direct examination of Mr. Sener on page 5058.
3 This is direct examination.

4 "Question: Now, what was your
5 responsibility in connection with the work on the
6 interconnection when you resumed activity in
7 March of 1972?

8 "Answer: Well, in March of 1972 it was my
9 job to get this activity underway and constructed
10 as soon as possible, that is, the activity
11 indicated by the FPC order."

12 At page 5070, this is still direct
13 examination:

14 "Question: And please refer specifically
15 to CEI 575" -- that's Exhibit 575 -- "and what
16 is the fact as to whether in that letter you reminded
17 Mr. Ackerman again of the need to provide terminal
18 facilities?"

19 "Mr. Hjelmfelt: Objection.

20 "Sustained. Leading.

21 "Question: Tell me what you advised Mr.
22 Ackerman on the occasion of CEI Exhibit 575.

23 "Answer: Regarding the 69 KV plan I
24 advised him that it seemed prudent to complete
25 this effort as soon as possible to minimize any

1 near-term customer interruption in the MELP
2 system while working toward early completion of
3 the 1938 facilities."

4 And perhaps the first departure from the
5 substance of the stipulations as considered by
6 the Court in its initial ruling, cross-examination
7 of Mr. Hauser. This is at page 2722:

8 "Question: Did CEI cooperate with the City
9 toward the end of getting the 69 temporary tie
10 into operation as quickly as possible?

11 "Answer: Yes.

12 "Question: Did CEI do anything that was
13 designed to delay or make more costly the
14 construction of the 69 temporary KV tie-in?

15 "Answer: No."

16 As I read the stipulations, gentlemen, it
17 would appear -- and this is why the Court is
18 indicating arguments at this time -- that there
19 has been a departure in the testimony from the
20 thrust of the Noerr-Pennington doctrine and,
21 although the Court's order as it relates to
22 the application of the Noerr-Pennington doctrine
23 to the stipulations remains intact, the Court is
24 concerned as to whether or not the testimony
25 that I have just alluded to creates a question of

1 fact, in a limited sense and under a proper
2 charge to the jury, to be presented to the jury
3 as to whether, in fact, the Miller activity,
4 albeit permitted by Noerr-Pennington, becomes
5 appropriate at this point in time to rebut the
6 testimony, the direct testimony, of the various
7 witnesses that I have identified.

8 So, gentlemen. Mr. Lansdale?

9 MR. LANSDALE: I would invite your
10 Honor's attention to the fact that the Miller
11 episode, which began February 24, 1972, and
12 ended with the dismissal of the lawsuit in May,
13 May 23, 1972, there was later activity by
14 Judge Pryatel in rewithdrawing his order of
15 dismissal and writing a new order, but so far as
16 activity by the parties were concerned, the
17 period involved was February 24 through May 23,
18 1972.

19 I point out to your Honor that this lawsuit
20 and any activity respecting it had absolutely
21 no effect whatsoever upon the activities of
22 the City of Cleveland with respect to this line.
23 It did not interfere with it, it did not stop it,
24 it did not do anything. And, of course, this
25 fact appears through Plaintiff's Exhibit 2749,

1 which is a letter of Collier Construction
2 Company dated May 18, 1972, to Mr. Hinchee which
3 expresses some worry about this litigation but
4 points out that Collier Construction Company has
5 continued to work.

6 So that this episode in fact caused no delays
7 or interference to the city.

8 The most that this would do would be to go
9 to an intention by CEI respecting this matter.

10 Now, the evidence of intention involved in
11 this thing, I submit, gains nothing for the city.
12 The prejudice to the company, however, is apparent.

13 Going to Mr. Fowlkes testimony, the testimony
14 to which your Honor alluded had two aspects to
15 it. The primary thing related to the terminal
16 work to be done by the City and the program with
17 respect to that. This had nothing whatever to do
18 with the subject matter of the lawsuit and all of
19 the activity in respect to that took place
20 after the lawsuit episode was finished. There
21 was an interrogation respecting the interference
22 by CEI with the line, but it all related to
23 July, 1972, and later, which was after this
24 episode was closed.

25 With respect to Mr. Williams' testimony,

1 I have no doubt in the world that Mr. Williams
2 was speaking the truth when he said what he did.

3 THE COURT: I am not attacking the
4 integrity of any of the testimony. I am merely
5 commenting upon the inferences implicit in the
6 testimony. The testimony may have been given in
7 good faith and undoubtedly was and without any
8 knowledge.

9 MR. LANSDALE: Well, if your Honor
10 please, I submit that the Miller episode, if it
11 reflects anything, reflects an intent by CEI to
12 require the City to put this line underground
13 which would have had the effect of increasing
14 the expense. It did not succeed. Here it is
15 1980, which is eight years subsequent to that
16 episode. The same line is still there in the
17 same place that it was. And the most that this
18 can contribute to the case is some evidence of
19 what some people may regard as an evil intent
20 by the Cleveland Electric Illuminating Company
21 without going to the question of --

22 THE COURT: Of course, Mr.
23 Lansdale, the intent, if in fact it was, as you
24 put it, evil intent -- perhaps the more
25 appropriate would be anticompetitive attempt --

1 is condoned by Noerr-Pennington. So that's not
2 the issue. You are attempting to take me off on
3 a tangent.

4 MR. LANSDALE: I hope I take your
5 Honor off on any admissibility of this stipulation,
6 but I am genuinely not trying to take your
7 Honor off on a tangent.

8 I submit that --

9 THE COURT: It is my understanding,
10 and I may be wrong, that success or failure of
11 the intended act is not a criteria as it
12 relates to an expression of intent.

13 MR. LANSDALE: Not as such, if your
14 Honor please. I submit, of course, it is not
15 material as such.

16 But what I am trying to suggest is that the
17 so-called exception with which we are dealing
18 in the footnote in the Noerr-Pennington, in
19 the Pennington decision -- the number of the
20 footnote I forget at the moment -- speaks of
21 permitting, in the discretion of the Court,
22 the admissibility of this testimony for the
23 purpose of giving character and content to other
24 activities which are the subject appropriately
25 of the testimony of the like, and I am at a loss

1 to put my finger on the specific activity of this
2 defendant to which this stipulation is alleged
3 possibly to give character and content which would
4 assist the plaintiff.

5 THE COURT: Character and content
6 all reflect on the purpose of the intent.

7 MR. LANSDALE: Yes, but what act is
8 it, what thing is it we did that this is supposed
9 to give character and content to?

10 The burden, I will submit, of our testimony
11 on this line by Mr. Sener and Mr. Williams who
12 testified concerning it dealt rather extensively
13 with our activities that were carried on, all of
14 which, I believe, are substantiated, I believe,
15 by the written record, and I submit to your
16 Honor that there are no activities against the
17 progress of the line or refusal to do anything
18 to which this Miller episode can be said to give
19 any invidious aspect to.

20 And surely if --

21 THE COURT: I don't think there
22 is any question about that. An appropriate
23 charge would charge that out.

24 MR. LANSDALE: But the whole purpose
25 for which the Pennington decision permits the

1 Court in its discretion to admit this evidence
2 is to characterize or to give content to other
3 actions, not the action itself which is admitted
4 but other actions, and what I am trying to
5 suggest to your Honor is that there are no
6 other actions, certainly none to which I think
7 we have opened the door in our testimony or Mr.
8 Norris in his cross-examination, in the area to
9 which you have alluded which deal with acts or
10 threatened acts which this episode or this
11 stipulation might be said to give character or
12 content in any way bearing upon anticompetitive
13 activity of this defendant.

14 I submit to your Honor that it can form no
15 purpose or function along the lines that the
16 footnote of the Pennington decision alludes to
17 in permitting the admission of such evidence
18 for purposes there stated.

19 THE COURT: Thank you, Mr.
20 Lansdale.

21 The City?

22 MR. NORRIS: When this matter was
23 first argued, the city urged upon the Court the
24 proposition that the Noerr-Pennington doctrine,
25 of course, precluded any claim for damage to be

1 predicated upon this conduct, but we did argue at
2 that time that the exception to Noerr-Pennington
3 to show the purpose and character of other
4 transactions in issue was appropriate for this to
5 be admitted.

6 At that time Mr. Lansdale argued that
7 because the cause had succeeded it, therefore,
8 was not taken out of Noerr-Pennington, and I do
9 think whether the case succeeded or not, I
10 agree with Mr. Lansdale's later position that it
11 doesn't matter.

12 There are really two issues to which these
13 stipulations are now relevant. They are,
14 perhaps, opposite sides of the same coin, but not
15 only was there testimony from Mr. Williams and
16 Mr. Sener and Mr. Hauser that nothing was done
17 by CEI to interfere with or delay or make more
18 costly, either directly or indirectly, the
19 interconnection, we do think that these
20 stipulations should be read to the jury to rebut
21 that question of fact.

22 Additionally, however, there was testimony
23 as to the positive things that CEI did to assist
24 Muny Light in all of the enterprises of its
25 going forward with respect to that 69 KV

1 interconnection, and that raises an issue that
2 these stipulations are appropriate to rebut.

3 Additionally, Mr. Sener actually met with
4 Mr. Miller on May 17, 1972, and that is shown
5 in Joint Stipulation 233, which I think just
6 adds frosting to the cake that it is appropriate
7 that these stipulations should be read.

8 We have also argued previously, and I
9 won't burden the Court with an extensive
10 reiteration but --

11 THE COURT: You don't need to
12 reiterate it at all because I have already
13 ruled on your previous argument. What I am
14 concerned about is the argument before me now.

15 MR. NORRIS: Well, the basic
16 issue, we think, is addressed by the prior
17 inconsistent conduct provision in the rules of
18 evidence that we think that the actual conduct
19 should be permitted to be known to the jury to
20 rebut the claims that the defendant is now
21 making as to what that conduct was.

22 We also submit that as a matter of public
23 policy that Mr. Fowlkes, as an official
24 representative of the FERC, conceivably could
25 have been misled by --

1 THE COURT:

Oh, now, Mr. Norris,

2 there is nothing in the evidence on that. Why
3 don't you limit yourself to the arguments before
4 me. There is nothing in the evidence about any
5 misleading anybody.

6 The only issue that I am entertaining at
7 this point in time is whether or not Stipulations
8 226 and 3241 should be admitted into evidence
9 in light of the facts that have been developed
10 by testimony that is in the record. Now, I
11 don't wish to go beyond the record.

12 You know, we run into this same problem
13 all the time, Mr. Norris. Will you kindly
14 address yourself to the issue before me?

15 MR. NORRIS:

In short summary,
16 we believe that the prior inconsistent conduct
17 that CEI has agreed to in the stipulation must
18 be presented to the jury to help rebut the
19 testimony that has been alluded to by your
20 Honor.

21 The CEI offers the testimony with respect
22 to their evidence of good faith and their good
23 heartedness similarly is an issue of fact to
24 which the stipulations are relevant. We believe
25 that they should be read to the jury.

1 MR. LANSDALE: May I say a word?

2 THE COURT: You just said one
3 word.

4 MR. LANSDALE: How about a dozen,
5 your Honor?

6 I only want to remark that I did not hear
7 Mr. Norris mention one single act that CEI did
8 to which this Miller episode is supposed to give
9 character and content.

10 THE COURT: Thank you, gentlemen.
11 Have a nice weekend. See you Monday morning at
12 8:30.

13 {Court adjourned at 4:30 P.M.}

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